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No. _____

In The

Supreme Court of the United States

October Term, 1998

CRESCENT TOWING & SALVAGE COMPANY, INC. AND E.N. BISSO & SON, INC.,

Petitioners,

v.

ORMET CORPORATION AND THE GREATER BATON ROUGE PORT COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The Louisiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

STEWART F. PECK
Counsel of Record
SCOTT R. WHEATON, JR.
DAVID B. SHARPE
LUGENBUHL, BURKE, WHEATON, PECK, RANKIN & HUBBARD
601 Poydras St., Suite 2775
New Orleans, LA 70130-6027
(504) 568-1990
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Louisiana owns a public terminal on the Mississippi River, where ships from other nations and states deliver cargo. The ships must be assisted by docking tugs, which the ships traditionally hired from a highly competitive market. Since 1995, however, the terminal's lessee has permitted only one company to provide docking tugs, excluding the petitioner tug companies. Ships can no longer choose their own tugs. This exclusive franchise has been imposed with the State's tacit approval. Does the exclusive franchise violate the Commerce Clause?

LIST OF PARTIES

All parties to the proceeding below are identified in the caption of this Petition. Counsel for respondent Ormet Corporation, however, appeared in the proceedings below on behalf of "Ormet Primary Aluminum Corporation."

Pursuant to Supreme Court Rule 29.6, petitioner Crescent Towing & Salvage, Inc. is wholly owned by Cooper/T. Smith Corp. Crescent Towing has no non-wholly-owned subsidiaries. Petitioner E.N. Bisso & Son, Inc. has no parent corporation, and is the majority shareholder in a single non-wholly-owned subsidiary, Bisso Offshore L.L.C.

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OPINIONS BELOW

The September 9, 1998 decision of the Louisiana Supreme Court is scheduled for publication in the Southern Reporter (Second) series, but has not yet been assigned an official citation. That decision, including the dissenting opinion, is reproduced as Appendix A ("Pet. App. A") at 1a to 22a. No rehearing of that decision was sought.

The appeals from the trial court's denials of preliminary and permanent injunctive relief were assigned different docket numbers and addressed separately by the intermediate appellate court, the Louisiana First Circuit Court of Appeal. Both decisions, however, were announced on May 9, 1997. The First Circuit's decision concerning the permanent injunction is reported at 694 So.2d 1121, and is reproduced as Appendix C at 24a to 43a. The First Circuit's decision concerning the preliminary injunction was not reported, but is reproduced as Appendix D at 44a to 45a. No rehearing of either decision was sought.

The October 17, 1995 reasons for judgment of the trial court, the 19th Judicial District Court for the Parish of East Baton Rouge, Louisiana, are unreported, but are reproduced as Appendix E at 46a to 49a. The trial court's judgment denying preliminary injunctive relief is reproduced as Appendix F at 50a to 51a. The judgment denying permanent injunctive relief is reproduced as Appendix G at 52a to 53a.

JURISDICTION

The decision of the Louisiana Supreme Court was entered on September 9, 1998. No rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, provides in pertinent part: "The Congress shall have Power . . . To regulate Commerce . . . among the several States. . . . "

The Port Commission enabling act is published at La. R.S. 34:1221-1226, and pertinent excerpts are reproduced in Pet. App. H at 54a to 55a.

STATEMENT OF THE CASE

Introduction & Overview

Petitioners contend that an exclusive franchise violates the Commerce Clause. The franchise requires ships that call at a public cargo terminal on the Mississippi River to employ only those docking tugs provided by the terminal. The franchise outlawed a highly competitive market for tug services, and charges higher, non-negotiable rates to ships. The terminal's private lessee granted the franchise and profits from it, and the state lessor has not objected.

Petitioners E.N. Bisso & Son and Crescent Towing & Salvage provide tug services. Until the exclusive franchise took effect in May 1995, petitioners competed with each other, and with the exclusive franchisee, to provide tug services at the terminal. Respondents are the Greater Baton Rouge Port Commission, the terminal's municipal owner/lessor, and Ormet Corporation, the terminal's private lessee.

Petitioners challenged the exclusive franchise in Louisiana state court. Petitioners contended, *inter alia*, that its anti-competitive effects unduly burdened and discriminated against the interstate and foreign commerce conducted at the terminal. Petitioners therefore contend that the exclusive franchise violates the dormant Commerce Clause.

The Louisiana Supreme Court granted review solely to assess the Commerce Clause challenge, but never reached the merits. Instead, in a 5-2 decision, the court held that the exclusive franchise was immune from constitutional scrutiny. The majority ruled that, as lessor of a public facility, the state was a "market participant", not a "market regulator". Pet. App. A at 10a. The majority also ruled that because the objectionable franchise had been imposed by the terminal's private lessee, with only tacit state approval, there was insufficient state action upon which to base a constitutional challenge. *Id.* at 14a-15a.

Because the Louisiana Supreme Court's decision conflicts with other decisions that have invalidated exclusive franchises at public facilities, exacerbates disarray in the lower courts over the proper analysis of state action or inaction when the state leases public property, and

encourages discriminatory behavior at the increasing number of privatized, public facilities, petitioners seek relief from this Court.

The Burnside Terminal

The exclusive franchise challenged here is currently in effect at the Burnside terminal, a public bulk cargo handling facility located on the Mississippi River near Burnside, Louisiana, between New Orleans and Baton Rouge. Pet. App. N (excerpts from record on appeal) at 67a. The Burnside terminal was built with public funds by the Greater Baton Rouge Port Commission. Pet. App. A (La. Sup. Ct. Op.) at 2a. The Port Commission is a political subdivision of the State of Louisiana. *See* La. R.S. 34:1221-26 (West 1998). The Burnside terminal is presently leased to Ormet Corporation, a private, for-profit corporation. Pet. App. A at 2a. Under the terms of its lease, and in keeping with the public nature of the terminal, Ormet is required to make the terminal available to the public "without undue discrimination." Pet. App. J (Terminal Lease) at 58a.

About fifteen ships call at the Burnside terminal each month. Pet. App. C (Appellate Ct. Op.) at 26a. The primary cargo discharged at the terminal is bulk bauxite, a raw material used in the production of alumina. Pet. App. A at 3a. Most of the bauxite comes from South America. Caustic soda, another component of alumina, is delivered by barge from various U.S. chemical plants. Pet. App. N at 68a. "It is conceded that the Burnside terminal processes cargo that is in interstate and foreign commerce." Pet. App. A at 16a. (Justice Knoll, dissenting).

That flow of interstate and foreign commerce would stop, however, without the help of docking or "harbor" tugs. As the Louisiana Supreme Court correctly observed:

> Harbor tug service is required because the vessels are unable to maneuver into position alone, being unable to navigate laterally in the fast-moving current of the lower Mississippi River. The services of at least two harbor tugs are required per vessel that docks at the terminal.

Pet. App. A at 3a, n.2.

Before the exclusive franchise took effect, at least four tug companies "vigorously competed" to provide ship assist services at Burnside terminal. Pet. App. A at 3a. To win business from the owners of ships that called at the terminal, the tug companies offered discounts and negotiable credit terms. *Id.*; Pet. App. C at 26a. This competition created a "highly competitive market for tug services" at the terminal. Pet. App. C at 26a. Neither Ormet nor the Port Commission, however, had any involvement in that market.

The exclusive franchise eliminated both the competition and the market. In April 1995, Ormet issued a statement notifying shipowners that the exclusive franchise would soon take effect:

> Effective May 1, 1995, all vessels must arrange for "our" tugs when docking/undocking or any other activity requiring tug service. NO OUTSIDE TUGS EFFECTIVE 05/01/95.

See Pet. App. L (representative letter from Burnside terminal manager) at 62a; *see also* Pet. App. A at 3a-4a.

Since Ormet does not own any harbor tugs, when Ormet spoke of "our tugs", it meant tugs provided by Ormet's exclusive franchisee. Pet. App. A at 4a; Pet. App. C at 26a. The district judge remarked that this was "about as exclusive an arrangement as I can imagine". Pet. App. E (Reasons for Judgment) at 47a; *see also* Pet. App. A at 4a, n.3 (Louisiana Supreme Court observes that "Ormet has conceded that it currently uses only Bisso tugs.").

The exclusive franchise replaced the "highly competitive market for tug services" with a non-negotiable, fixed-price fee schedule. Before the exclusive franchise took effect, neither the Port Commission nor Ormet had any involvement in the ship-tug relationship. Now, for the first time, Ormet profits directly from the tug services its customers need: out of the $1,450 per tug collected from shipowners, Ormet pays the exclusive franchisee $1,100; Ormet keeps the balance for itself. Pet. App. A at 4a. The exclusive franchise also eliminated negotiable credit terms.

The exclusive franchise has a direct impact on both the ship-tug relationship and the commerce that flows through the terminal. Any ship transporting goods in interstate or foreign commerce, to or from the public terminal, must use tugs. Pet. App. A at 3a. But the exclusive franchise prohibits ships from using the harbor tugs of their choice. Pet. App. N at 68a. Instead, ships must use Ormet's tugs, and must pay non-negotiable rates for the privilege. Otherwise, the ship will be denied access to the "public" terminal. Pet. App. N at 69a ("If the ship was not using our [Ormet's] tug, it would not be allowed to dock."). The exclusive franchise also results in at least a "nominal increase in shipping costs." Pet. App. C at 42a;

but see Pet. App. A at 4a, n.4 (the Louisiana Supreme Court states that although the actual impact of the exclusive franchise upon voyage costs is disputed, there is evidence that the rate charged by Ormet is competitive). Because of restrictiveness and cost of the exclusive franchise, ship's agents have complained about the franchise, and have threatened to take their business elsewhere. *See e.g.* Pet. App. M (representative letter from ship's agent to Burnside terminal manager) at 64a.

Procedural History

Ormet did not request permission from the Port Commission, the terminal's lessor, before imposing the new requirement. Indeed, because of an earlier amendment to the terminal lease,[1] the Port Commission had delegated to Ormet the power to impose terminal rules and regulations without Port Commission approval. Pet. App. K (Addendum No. 8 to Terminal Lease) at 60a. Despite protests from petitioners, another former competitor, and various shipping interests, the Port Commission tabled public consideration of the exclusive franchise, thereby tacitly approving it. Pet. App. A at 4a, n.5.

Petitioners then filed suit in Louisiana state court, seeking an injunction to restore the *status quo*: an open

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[1] The original Terminal Lease provided that the lessee could establish charges "for use of the Terminal, which shall be subject to the approval of Lessor." Pet. App. J at 59a. Addendum No. 8, entered into on January 1, 1992, eliminates the requirement that the Port Commission approve charges, and permits Ormet to establish charges that it deems subjectively reasonable. Pet. App. K at 60a.

market for harbor tug services at Burnside terminal. In their Amended Petition, plaintiff-petitioners raised the Commerce Clause issue. Pet. App. I at 56a-57a. After three days of trial, the district judge agreed that the exclusive franchise was "about as exclusive an arrangement as I can imagine." Pet. App. E at 47a. He also expressed concern that, if this sort of exclusive arrangement spread, which he deemed likely, it would have a "deleterious effect". *Id.* at 48a. Nevertheless, the district judge denied preliminary and permanent injunctive relief. Pet. App. F at 50a (judgment denying preliminary injunction); Pet. App. G at 52a (judgment denying permanent injunction on the same record). The district judge expressly held that the exclusive arrangement did not violate the Commerce Clause. Pet. App. E at 48a.

Petitioners timely appealed, but the Louisiana First Circuit Court of Appeal affirmed. *See* 694 So.2d 1121 (La. App. 1st Cir. 1997), Pet. App. C at 24a. The First Circuit did not dispute that petitioners were potentially eligible for injunctive relief. Instead the Court of Appeal held that, as a matter of law, petitioners had not proven their entitlement to an injunction under any of five legal theories, including violation of the dormant Commerce Clause. Pet. App. C at 42a.

Petitioners then applied for a writ of certiorari to the Louisiana Supreme Court. The Louisiana Supreme Court granted the writ, limited solely to the Commerce Clause issue. Pet. App. B at 23a. The Commerce Clause issue was then fully briefed and argued.

On September 9, 1998, the Louisiana Supreme Court, in a five-to-two decision, ruled that the exclusive franchise

was immune from Commerce Clause scrutiny. The court held, rather inconsistently, that the Port Commission was on one hand a market participant, yet on the other hand, not sufficiently involved in the terminal operations to trigger state action. Pet. App. A at 10a, 14a. The Louisiana Supreme Court therefore affirmed the lower court judgments. *Id.* at 15a.

Petitioners now seek relief from this Court: reversal of the lower decisions, and return of the *status quo* at the Burnside terminal – free competition for harbor tug services.

REASONS FOR GRANTING THE WRIT

Introduction

This case involves an issue that has divided and confounded the lower courts: whether a state or local government can insulate itself from constitutional scrutiny by leasing its public facility to a private operator.

The issue can arise in two ways: when allegedly unconstitutional, discriminatory action is taken directly by the state in its capacity as lessor (state lessor action); and when the state merely permits discriminatory action to be taken by its private lessee (state lessor inaction). In either case, the threshold question is whether the challenged discrimination, no matter how egregious, is actionable under the Federal Constitution.

It should not matter, for the purpose of assessing this important threshold question, whether state lessor action or inaction is being challenged. A state should not be able

to accomplish indirectly what it cannot accomplish directly. Otherwise, the lease could be used as a constitutional dielectric, permitting the state to profit from discrimination at its own facilities, while insulating the discrimination from constitutional scrutiny.

Misguided and distracted by inconsistent case law, however, the Louisiana Supreme Court below erroneously permitted the Port Commission's lease to insulate the exclusive harbor tug franchise from constitutional scrutiny. This dangerous precedent conflicts with other decisions that have evaluated state lessor action and inaction. And it will encourage widespread discrimination at the growing number of privatized state facilities. The Louisiana Supreme Court's decision should therefore be overruled.

A. The Louisiana Supreme Court's decision conflicts with circuit court decisions that have invalidated exclusive franchises at public terminals.

The Commerce Clause "not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988) (citations omitted). This limitation on state power, which prohibits economic protectionism, is commonly referred to as the "dormant" Commerce Clause.

The Louisiana Supreme Court's decision below conflicts with circuit court decisions that have invalidated, under the dormant Commerce Clause, exclusive franchises for transportation services at public terminals. In

Southerland v. St. Croix Taxicab Ass'n, for example, the Fifth Circuit held that an exclusive taxicab franchise, which required interstate travelers to use only the favored, local taxicab operators, violated the Commerce Clause. 315 F.2d 364, 369 (5th Cir. 1963). The court held that forcing an interstate traveler to abandon the local transport company of his or her choice, in favor of a state-approved, exclusive franchisee, imposes an "unwarranted burden" on interstate commerce. *Id.* Following *Southerland*, the Fifth Circuit in *Charter Limousine, Inc. v. Dade County Bd. of County Comm'rs* held that an exclusive airport limousine franchise, which required interstate travelers to use only the favored, local shuttle service, also violated the Commerce Clause. 678 F.2d 586, 589 (5th Cir. 1982).

The exclusive harbor tug franchise granted by Ormet with the Port Commission's tacit approval is indistinguishable from the exclusive taxicab and limousine franchises struck down in *Southerland* and *Charter Limousine*. As in those cases, the exclusive harbor tug franchise forces an interstate traveler – a ship – to abandon the local transportation service of its choice – any one of the formerly competing harbor tug companies – in favor of a state-approved franchisee. And like taxicabs and airport limousines, harbor tugs provide a transportation service that is essential to the completion of interstate or foreign travel. Pet. App. A at 3a, n.2 (harbor tugs services are required because ships cannot maneuver into position alongside the terminal without assistance).

The fact that the exclusive franchises in *Southerland* and *Charter Limousine* were granted directly by a municipality does not distinguish them from this case. When the

Terminal Lease was amended in 1992, the Port Commission delegated to Ormet the authority to establish such a discriminatory franchise. Pet. App. A at 2a, n.1 (the original Terminal Lease provided that rules and regulations established by the terminal lessee were subject to Port Commission approval, but the 1992 amendment deleted that requirement); *also compare* Pet. App. J (Terminal Lease) ¶ 16 at 59a (Port Commission oversight requirement) *with* Pet. App. K (Addendum No. 8) ¶ 16 at 60a (deleting Port Commission oversight requirement). The exclusive franchise in this case is no less discriminatory or unconstitutional because it was implemented by the public terminal's private lessee, with authority delegated by the municipal lessor, instead of being implemented directly by the lessor. To hold otherwise would permit the state to accomplish indirectly what it cannot accomplish directly, a result that should be equally repugnant under the Constitution. *See e.g. Holodnak v. Avco Corp.*, 514 F.2d 285, 289 (2nd Cir.), *cert. denied*, 423 U.S. 892 (1975).

In conflict with these authorities, however, the exclusive franchise approved by the Louisiana Supreme Court in this case permits just that result. This Court should grant certiorari to resolve the conflict created by the Louisiana Supreme Court's decision.

B. The Louisiana Supreme Court's decision conflicts with other decisions that have evaluated allegedly unconstitutional state lessor action and inaction at public facilities.

The Louisiana Supreme Court did not evaluate whether the challenged franchise burdens or discriminates against interstate and foreign commerce. Instead, the court was distracted by the threshold question of whether state action was involved. The Louisiana Supreme Court was led astray by the inconsistent ways other courts have evaluated the constitutionality of a state lessor's action or inaction.

The Louisiana Supreme Court first attempted to evaluate the Port Commission's role in the exclusive franchise using the market-participant doctrine. The market-participant doctrine "differentiates between a State's acting in its distinctive governmental capacity, and a State's acting in the more general capacity of a market participant; only the former is subject to the limitations of the negative Commerce Clause." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 277 (1988), *citing Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806-10 (1976). Thus, under the market-participant doctrine, "a State acting in its proprietary capacity as a purchaser or seller may 'favor its own citizens over others.' " *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997), *citing Alexandria Scrap*, 426 U.S. at 810; *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); and *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983).

A state that acts as a market regulator, however, is exposed to full Commerce Clause scrutiny. *Reeves*, 447

U.S. at 436-37. A state acts as a market regulator when it attempts to "govern the private, separate economic relationships of its trading partners. . . . " *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 99 (1984) (plurality opinion). A state also acts as a market regulator when it attempts to "impose rules on the conduct of private parties with whom the state has no contractual relation." Barton B. Clark, Comment, *Give 'Em Enough Rope: States, Subdivisions and the Market-Participant Exception to the Dormant Commerce Clause*, 60 U. Chi. L. Rev. 615, 616 n.12 (1993).

There are also limits to the market-participant doctrine itself. When acting as a market participant, a state can impose burdens only on the market in which it is a participant. "The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market." *Wunnicke*, 467 U.S. at 97. The relevant market is therefore narrowly defined, to prevent the doctrine's limited immunity from "swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry." *Id.* at 98. In addition to being narrowly construed, the market-participant doctrine has also been criticized for its "inherent weakness". *Id.* at 101 (Justice Brennan, concurring).

The Louisiana Supreme Court's decision that the Port Commission was a market participant, instead of a market regulator, exacerbates a split in the lower courts over how to characterize a state lessor under the market-participant doctrine. In *Smith v. Dept. of Agriculture of the State of Georgia*, the Fifth Circuit held that the state lessor

of space at a public farmer's market was acting primarily as a market regulator, and not as a market participant, when it offered preferential treatment to in-state lessees. 630 F.2d 1081, 1083 (5th Cir. 1980), *cert. denied*, 452 U.S. 910 (1981). The Louisiana Supreme Court attempted to distinguish *Smith*, holding, "The Port Commission's actions, merely as the lessor of a marine terminal, were those of a market participant, in competition with other terminals, rather than a market regulator." Pet. App. A at 10a. In so holding, the Louisiana Supreme Court aligned itself with cases like *Four T's, Inc. v. Little Rock Municipal Airport Comm'n*, where the Eighth Circuit rejected *Smith*, and held that the municipal lessor of a public airport terminal was acting as a market participant, not a market regulator, when it imposed fees on terminal tenants. 108 F.3d 909, 913 (8th Cir. 1997). The district courts have continued to divide on this issue. *Compare Transport Limousine of Long Island, Inc. v. Port Authority of New York & New Jersey*, 571 F. Supp. 576, 581 (E.D.N.Y. 1983) (municipal lessor of public airport terminal space held to be acting as a market participant) *with Air Transp. Ass'n of America v. City & County of San Francisco*, 992 F. Supp. 1149, 1163 (N.D. Cal. 1998) (municipal lessor of airport held to be acting as a market regulator) *and Airline Car Rental, Inc. v. Shreveport Airport Auth.*, 667 F. Supp. 303, 305-306 (W.D. La. 1987) (same).

The Louisiana Supreme Court's decision also conflicts directly with this Court's own teachings concerning the market-participation doctrine. According to *White*, the doctrine only applies when "the challenged 'program constitute[s] direct state participation in the market.' " 460 U.S. at 208, *citing Reeves*, 447 U.S. at 436, n.7. It

follows that indirect state participation in the relevant market would not qualify for protection under the market-participant doctrine. Here, the relevant market is harbor tug services, the market eliminated by the exclusive franchise. But only indirect state participation in that market – the Port Commission's tacit approval of discriminatory behavior in that market – is being challenged. No Port Commission action as a buyer or seller is being challenged. Market-participant immunity should not, therefore, apply. Not surprisingly, the Louisiana Supreme Court's grant of immunity for the Port Commission's passive role in approving the exclusive franchise is unprecedented.

Recognizing that this case involves challenged state inaction, the Louisiana Supreme Court next evaluated the Port Commission's role using the symbiotic-relationship test established in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and christened in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175 (1972). In *Burton*, the private lessee of restaurant space that was located in a public parking garage racially discriminated against a patron. The restaurant was operated as an integral part of the public facility. The municipal owner neither prevented nor encouraged the discriminatory behavior. The patron sought an injunction and a declaration that the discrimination violated the Equal Protection Clause of the Fourteenth Amendment.

This Court agreed that the state's inaction was itself actionable under the Federal Constitution. 365 U.S. at 725. The publicly-owned parking garage and the privately-operated restaurant conferred a variety of benefits upon each other. The restaurant profited from the proximity of

the garage, and the garage profited from increased demand provided by restaurant patrons. To the extent the restaurant's business increased because of the discrimination, the municipality also profited. This symbiotic relationship between the state lessor and the private lessee made the lessor liable for the lessee's discrimination, something the state could not ignore. "[N]o state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be." 365 U.S. 725. Thus, the restaurant lease did not insulate the municipal lessor from discrimination practiced by the private lessee.

Although *Burton* arose in a Fourteenth Amendment, equal-protection context, its symbiotic-relationship test has also been used to evaluate state action or inaction in Fourteenth Amendment due-process claims and in First Amendment free-speech claims. *Jatoi v. Hurst-Euless-Bedford Hospital Authority*, 807 F.2d 1214 (5th Cir. 1987), *op. modified on denial of reh'g*, 819 F.2d 545 (5th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988) (applying *Burton* to evaluate a doctor's due-process claim for wrongful discharge from a privately-operated, state-owned hospital); *Holodnak v. Avco Corp.*, 514 F.2d 285 (2nd Cir.), *cert. denied*, 423 U.S. 892 (1975) (applying *Burton* to evaluate a union worker's First Amendment defense to behavior that led to his allegedly wrongful discharge from a privately-operated facility located on federal property). The Louisiana Supreme Court's use of *Burton* in a Commerce Clause case, however, is unprecedented.

In addition to *Burton*'s symbiotic-relationship test, state-action doctrine includes at least two or three other, sometimes inconsistent tests. *Compare Community Medical*

Ctr. v. Emergency Medical Serv. of Northeastern Pa., Inc., 712 F.2d 878, 880 (3rd Cir. 1983) (identifying three tests, including *Burton*'s, and observing that "[t]he relationship of these various tests to one another remains unclear, since the Supreme Court has not sought to reconcile apparent inconsistencies between the tests; nor has it overruled earlier precedents that seem unlikely to survive any of the tests that have been propounded more recently") *with Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447 (10th Cir. 1995) (identifying four tests, including *Burton*'s, and citing various authorities critical of the state-action doctrine); *see also* Daphne Barak-Erez, *A State Action Doctrine For An Age of Privatization*, 45 Syracuse L. Rev. 1169, 1174 (1995) (identifying at least two theories for recognizing private activities as state actions: a public-function theory and a nexus theory). The state-action doctrine itself has received considerable criticism over the years. *See e.g.* Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. Rev. 503, 505 (Fall 1985) ("I'd suggest that it is time to begin rethinking state action. It is time to again ask why infringements of the most basic values – speech, privacy, and equality – should be tolerated just because the violator is a private entity rather than the government."). As this Court conceded in *Lebron*, "It is fair to say that 'our cases deciding when private action might be deemed that of the state have not been a model of consistency.' " *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995).

But when evaluating a state's inaction in its capacity as owner of privately leased or operated facilities, the circuit courts have consistently applied *Burton*'s symbiotic-relationship test. *See e.g. Gallagher*, 49 F.3d at 1451-53

(applying the symbiotic-relationship test, among others, to evaluate allegedly unconstitutional pat-down searches by agents of a private lessee at a concert held in a state-owned facility); *Jatoi*, 807 F.2d at 1221 (applying the symbiotic-relationship test to evaluate alleged racial discrimination at a privately-operated, state-owned hospital); *Holodnak*, 514 F.2d at 289 (applying the symbiotic-relationship test to evaluate alleged interference with an employee's right to free speech at privately-operated, federally-owned manufacturing facility). These courts are unanimous in recognizing that, in principle, state acquiescence in private discrimination can be challenged under the Constitution. That is the essence of *Burton*, which remains good law.

The Louisiana Supreme Court, however, announced a new rule that directly conflicts with these authorities. First, the court challenged *Burton*'s continuing vitality "in light of the Court's passing footnote reference to it in the subsequent case of *San Francisco Arts & Athletics v. Olympic Committee*, 483 U.S. 522 (1987)." Pet. App. A at 13a-14a, n.9. It seems unlikely, however, that this Court implicitly overruled *Burton* in a "passing footnote reference" in 1987, when *Burton* was cited by this Court as recently as 1995 in *Lebron*. 513 U.S. at 378. Next, the court proclaimed that "when the private entity's decision is, at most, merely approved by or acquiesced in [by] the government, the private entity's action likely will not be characterized as state action." *Id.* at 14a. This new rule would permit what *Burton* and its progeny prohibit: a state lessor's abdication of its constitutional responsibilities by ignoring them or merely failing to discharge them. *Burton*, 365 U.S. at 725. This new rule would also

permit a state's lease of a public facility to act as a constitutional dielectric, insulating from constitutional scrutiny discriminatory behavior that would otherwise be actionable. The Louisiana Supreme Court's rejection of *Burton*, and its declaration of a new rule that gives blanket immunity to states for discriminatory behavior taken by their lessees, creates a split in authority on an important federal question that can only be resolved by this Court.

C. The extent to which a state or local government can insulate practices at public facilities from constitutional scrutiny by leasing those facilities to private operators is a matter of national importance.

The Louisiana Supreme Court's decision raises an issue of national importance: whether a state or local government can insulate practices at public facilities from constitutional scrutiny by leasing those facilities to private operators. This issue is important because of the growing trend toward privatization of public facilities.

States play a unique role in the national economy by providing public facilities such as hospitals, waste disposal sites, airports, and river terminals. States regulate the business of those facilities for various reasons: from advancing social policy[2] to raising revenue,[3] that

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[2] *See Air Transp. Assn. of America v. City & County of San Francisco*, 992 F. Supp. 1149, 1163 (N.D. Cal. 1998) (ordinance requires private users of municipal airport not to discriminate against the users' own employees based on sexual orientation).

[3] *See C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) (flow control ordinance intended to guarantee revenue for municipal waste transfer facility).

"primeval governmental activity". *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 277 (1988). Although a state can charge a public facility's users a reasonable fee for the privilege of doing business at the facility, the state cannot assert "selfish dominion over the channels of commerce", including navigable waterways. Mark P. Gergen, *The Selfish State and the Market*, 66 Tex. L. Rev. 1097, 1133 (May 1988). Indeed, freedom of navigation on the Mississippi River is so sacred that preserving that freedom was a precondition to Louisiana's statehood. *See e.g.* Enabling Act for Louisiana, ch. 21, § 3, 2 Stat. 641, 642 ("The river Mississippi and the navigable rivers and waters leading into the same or into the Gulf of Mexico, shall be the common highways and forever free as well to the inhabitants of the said State and other citizens of the United States."); Pet. App. A at 15a (Justice Knoll, dissenting), *citing* 33 U.S.C. § 10 ("[a]ll the navigable rivers and waters in the [former] Territor[ies] of Orleans and Louisiana shall be and forever remain public highways."). Transportation is an essential ingredient to commerce, so states are also prohibited from regulating the means of interstate transportation. *Southern Pac. Co. v. State of Arizona ex rel. Sullivan*, 325 U.S. 761, 781-82 (1945) (state cannot limit the length of trains moving in interstate commerce). Thus, a state "may not ignore the dormant Commerce Clause in deciding who gains access to the infrastructure of interstate trade." Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 Mich. L. Rev. 395, 450 (Dec. 1989). And a state cannot insist that articles moving in interstate or foreign commerce be serviced only within the state. *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) (a

flow-control ordinance that requires trash to be sorted at a municipal transfer facility violates the Commerce Clause); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984) (a state sales contract that requires timber to be processed within the state before being exported violates the Commerce Clause).

Within certain limits, states can delegate to private companies the operation of traditionally state-run facilities, such as prisons, hospitals and parking garages. There is a growing trend, both nationally and internationally, toward privatization of such public facilities. *See e.g.* Warren L. Ratliff, Note, *The Due Process Failure of America's Prison Privatization Statutes*, 21 Seton Hall Legis. J. 371, 371-72 (1997) (citing the "phenomenal" expansion of America's private prison system); Phyllis E. Bernard, *Privatization of Rural Public Hospitals: Implications for Access and Indigent Care*, 47 Mercer L. Rev. 991, 992 (Summer 1996) (privatizations in general, and of public hospitals in particular, began to soar in the 1980s); A.B.A, *Introduction: Privatization – The Global Scale-Back of Government Involvement in National Economics*, 48 Admin. L. Rev. 435, 435 (Fall 1996) ("One word sums up the dominant international economic trend: privatization."). After delegating this responsibility, however, the state cannot ignore the manner in which the private operator or lessor manages the public facility. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); Daphne Barak-Erez, *A State Action Doctrine For An Age of Privatization*, 45 Syracuse L. Rev. 1169, 1174 (1995) (a state may be passive, and permit a private company to administer a traditionally public function, but the state's "failure to act cannot change the

scope of its constitutional responsibility – although the mission was carried out by a private actor.").

This case tests the limits, under the dormant Commerce Clause, of a state's right to delegate operation of a public terminal to a private operator. In this case, the municipal Port Commission leased its public cargo terminal to Ormet, a private, for-profit company. In keeping with the terminal's public nature, the Lease required Ormet to make the terminal available to the public "without undue discrimination". Pet. App. J (Terminal Lease) ¶ 2 at 58a. Until 1992, rules and regulations for use of the Burnside terminal were subject to Port Commission approval. *Id.* at ¶ 16, 59a. This is consistent with the state oversight that would typically be required of a public utility or other facility that enjoyed immunity from anti-trust laws. *See e.g. F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992) (a state may displace competition with active state supervision, but actual state involvement, not passive deference to private arrangements, is a precondition to state immunity from federal anti-trust laws). In 1992, however, the Lease was amended to remove Port Commission oversight of Ormet's rules and regulations. Pet. App. K (Addendum No. 8) ¶ 16 at 60a. As a result, the Port Commission relinquished active supervision over Ormet's management of the Burnside terminal. The district judge below was properly concerned with this lack of oversight. *See* Pet. App. E (Reasons for Judgment) at 48a.

In 1995, freed from a watchful, governmental lessor, Ormet instituted the exclusive franchise challenged here. *See e.g.* Pet. App. L (representative letter from Burnside terminal manager to steamship agency) at 62a (advising

that as of May 1, 1995, "no outside tugs" would be permitted to dock ships at the Burnside terminal). Steamship agencies, who represent shipowners, complained that the franchise was anti-competitive and interfered with shipowners' pre-existing contracts with companies other than the exclusive franchisee. *See e.g.* Pet. App. M (representative letter from steamship agency to Burnside terminal manager) at 64a (complaining about exclusive franchise). Petitioners also complained, but the Port Commission tabled consideration of the issue. Pet. App. A (La. Sup. Ct. Op.) at 4a.

The question is whether the amended Terminal Lease, which permitted Ormet to impose the exclusive franchise without Port Commission oversight, insulates the exclusive franchise from Commerce Clause scrutiny. Clearly, if the franchise had been imposed directly by the Port Commission, the Louisiana Supreme Court would have reached the merits of the Commerce Clause challenge. There would be no threshold issue of state inaction under *Burton*. And the market-participant doctrine would not shield the franchise, which interferes with the dealings between the terminal's own customers and independent third parties. *Compare White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204, 211 n.7 (1983) (City of Boston was not a market regulator because the employees of the contractors with whom the City dealt were, in effect, "working for the city") *with South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984) (Alaska was a market regulator when it used its leverage in the selling market to exert regulatory effects in the unrelated processing market). In that sense, the franchise clearly

regulates commerce between tugs and ships on the Mississippi River. It outlaws pre-existing contracts between terminal users and all but the favored, local tugboat franchisee. And it reaches beyond the terminal, into the navigable waters of the Mississippi River, to affect business conducted adjacent to the terminal.

Petitioners contend that it should not matter, for the purposes of the Commerce Clause, whether it is the municipal lessor or the private lessee who is using its leverage in the state-granted market for public terminal services to exert a regulatory effect in the harbor tug market. In either case, the state or its agent is using leverage in one market to exert a regulatory effect in a second market in which neither the state nor its agent has ever been a direct participant. *See Wunnicke*, 467 U.S. at 98. The discriminatory effect on interstate and foreign commerce is the same. Here, instead of merely choosing its own trading partners, Ormet is – with the Port Commission's tacit approval – attempting to govern the private, separate economic relationships of the terminal's trading partners, the shipowners. To paraphrase *Wunnicke*, the state may not avail itself of the market-participant doctrine to immunize such upstream regulation of the harbor tug market, a market in which it is not a participant. *Id.* at 99. Neither should the public terminal's private lessee be able to immunize discriminatory regulation of the same market.

If abused, a private lessee's authority to exert regulatory power beyond the confines of its leased, public terminal, could result in higher prices. Here, the monopoly imposed by the exclusive franchise releases Ormet from pricing pressures that formerly existed in the

"highly competitive market for tug services" at the terminal. Pet. App. C (Appellate Ct. Op.) at 26a. Higher prices have resulted. *Id.* at 42a; *but see* 4a, n.4. And with no competition for harbor tug services at the Burnside terminal, Ormet is free to raise prices as it pleases. The temptation to do so, by Ormet or other terminal operators, may be irresistible once the scrutiny of the judicial process has turned away.

If the Louisiana Supreme Court's decision is permitted to stand, exclusive franchises could also be imposed in new service markets. The district judge below expressed concern that, "if [the exclusive franchise] were to spread, and I would suggest that if this arrangement is allowed, it very likely might spread, it could have a deleterious effect." Pet. App. E at 48a. This concern was shared by Justice Knoll in her dissent. Pet. App. A at 17a. These concerns about the infectious nature of anti-competitive behavior echo this Court's own remarks, uttered over 120 years ago, in *Foster v. Master & Wardens of the Port of New Orleans*, 94 U.S. (1876).

Like this case, *Foster* arose when a competitive market for vessel services on the Mississippi River was replaced with an exclusive franchise. In *Foster*, the Louisiana legislature had awarded an exclusive franchise for vessel hatch-cover surveys to the master and wardens of the Port of New Orleans. As in this case, a former competitor challenged the franchise under the Commerce Clause. This Court invalidated the franchise, criticizing it as "a clog and blow to all such commerce in the port to which they relate." 94 U.S. at 247. The Court recognized not only the franchise's direct burden upon shipowners and consignees, but also its "invasion of the rights of

persons outside of these classes." *Id.* at 248. The Court also feared the dangerous precedent that would be set if the exclusive franchise was sustained. If left unchallenged, other port services might also be granted monopolies, resulting in arbitrary prices and escalating burdens upon interstate and foreign commerce. *Id.*

As this Court observed in *Foster*, exclusive franchises are a cancer that can quickly spread to other areas of the national economic body. If the exclusive franchise for harbor tug services is valid in Baton Rouge, it will be valid in any other state-owned port facilities. Without a voice in the Louisiana political arena, out-of-state tug owners may retaliate by seeking comparable, favorable treatment in their own home ports. Facing increased voyage costs from unchecked harbor tug prices in Baton Rouge, foreign shipowners will trade elsewhere. *See* Pet. App. M (representative letter from steamship agency to Burnside terminal manager) at 64a (complaining about exclusive franchise, and threatening to trade elsewhere). This chilling of interstate and foreign commerce is exactly what the Commerce Clause seeks to prevent.

D. Exclusive franchises such as the one in effect at Burnside terminal burden and discriminate against interstate and foreign commerce.

If the Louisiana Supreme Court had not ruled that the exclusive franchise was immune from Commerce Clause scrutiny merely because the franchise was granted by a private lessee, the court would have been bound to rule that the franchise violated the Commerce Clause.

The dormant Commerce Clause forbids discriminatory regulation of interstate and foreign commerce by the states. States cannot curtail the movement of goods or services into or out of the state. *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992). States cannot regulate public use of interstate highways or waterways within the state. *Buck v. Kuykendall*, 267 U.S. 307 (1925) (state cannot parcel out "certificates of convenience" regulating public use of interstate highways within the state). States cannot issue licenses for the privilege of conducting interstate commerce. *Town of Vidalia v. McNeely*, 274 U.S. 676 (1927) (invalidating town requirement that an interstate ferry have a local license to operate). The freedom of commerce and navigation on the Mississippi River is particularly sacrosanct. *See* 33 U.S.C. § 10 ("All the navigable rivers and waters in the former Territories of Orleans and Louisiana shall be and forever remain public highways"); *see also* Mark P. Gergen, *The Selfish State and the Market*, 66 Tex. L. Rev. 1097, 1133 (May 1988) (a state cannot assert "selfish dominion over the channels of commerce", including navigable waterways). And the states cannot eliminate competition for services provided to those who move goods in interstate or foreign commerce. *Foster v. Master & Board of Wardens of the Port of New Orleans*, 94 U.S. 246 (1876) (invalidating exclusive franchise for hatch inspection services at the Port of New Orleans). In particular, a state cannot deprive competitors, including out-of-state firms, of access to a local market. *Carbone*, 511 U.S.

at 385. The scrutiny is even greater when foreign commerce is involved. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984).

The exclusive franchise in effect at Burnside terminal violates each of these prohibitions. It curtails the movement of goods in interstate and foreign commerce by barring from the public terminal any ship that refuses to use Ormet tugs. It prohibits the import of harbor tug services from other states. It regulates public use of the navigable Mississippi River by dictating whose tugs will escort ships across the river to the terminal. It regulates transportation itself, an essential ingredient to commerce. And it eliminates competition for harbor tug services at the public terminal by replacing a thriving, competitive market with a state-sanctioned monopoly. This exclusive deal clogs the free flow of commerce along America's main waterway through the heart of this Land. It "is no less discriminatory because in-state or in-town processors are also covered by the prohibition." *Carbone*, 511 U.S. at 391. Because the exclusive franchise burdens and discriminates against interstate and foreign commerce, it violates the dormant Commerce Clause.

The Louisiana Supreme Court, however, never tested the exclusive franchise with these controlling authorities. Instead, the court held that any discrimination at Burnside terminal was immune from Commerce Clause scrutiny. In permitting the exclusive franchise to stand, the court gave tacit approval to a dangerous precedent: the wholesale delegation of state regulatory authority at a public facility to a private actor, resulting in the grant of an exclusive franchise that burdens interstate and foreign commerce. As this Court observed in *Foster* over 120

years ago, and the district judge and Justice Knoll observed below, such behavior and its associated, deleterious effects are likely to spread if not checked. This Court's power to reverse or remand is the last resort against this danger.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

STEWART F. PECK
Counsel of Record
SCOTT R. WHEATON, JR.
DAVID B. SHARPE
LUGENBUHL, BURKE, WHEATON,
PECK, RANKIN & HUBBARD
601 Poydras St., Suite 2775
New Orleans, LA 70130-6027
(504) 568-1990
Counsel for Petitioners

APPENDIX

APPENDIX A

SUPREME COURT OF LOUISIANA

No. 97-C-1531
___ So.2d ___, 1998 WL 568692
(Argued: January 21, 1998; Decided September 9, 1998)

Crescent Towing & Salvage Co., Inc. and
E.N. Bisso & Son, Inc.,
Plaintiffs-Petitioners,

v.

Ormet Corporation and The Greater
Baton Rouge Port Commission,
Defendants-Respondents.

On Writ of Certiorari to the Court of Appeal,
First Circuit, Parish of East Baton Rouge.

Before:* Calogero, Chief Justice; Marcus, Victory, Knoll, Traylor, Lemmon, and Johnson, Justices.

LEMMON, Justice

Several tug boat companies filed this action seeking to enjoin the enforcement of a contract between a competitor towing company and the lessee of a public marine cargo terminal under which the lessee has exclusively employed the competitor to provide harbor tug service to ships that loaded and unloaded cargo at that terminal. In their petition, plaintiffs asserted, among other things, that the operations under the contract violate the Interstate

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* Kimball, J., not on panel. Rule IV, Part 2, § 3.

Commerce Clause. After the lower courts denied plaintiffs any preliminary or permanent injunctive relief, this court granted certiorari solely to address the Interstate Commerce Clause issue.

Facts

The Greater Baton Rouge Port Commission is the owner of a bulk cargo marine terminal located on the lower Mississippi River. The construction of the terminal pursuant to La.Rev.Stat. 34:1221-1226 was financed by the issuance of general obligation bonds. The Commission immediately upon completion of construction leased the terminal, which includes a dock and a nearby mooring buoy system for ships which load and unload cargo, to a chemical company with an industrial plant adjacent to the terminal. In October 1973, the original lessee assigned the lease to the Ormet Corporation.

The lease, which places responsibility on Ormet for operating, maintaining and repairing the terminal, provides that the terminal "shall be a public marine terminal for loading, discharging, transferring, storing and handling commodities in bulk," specifying that the terminal is to be used primarily for the businesses of the lessee and its subsidiaries, but, to the extent the terminal is not required for their businesses, is to be made available to the public "without undue discrimination."[1]

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[1] The original lease also provided that all rules, regulations, tariffs, rates and charges for use of the terminal were subject to the Commission's approval, but that requirement was deleted by addendum dated January 1, 1992.

Ormet primarily uses the terminal to import the raw materials for its alumina plant and to export its products. In addition to fulfilling its own needs, Ormet's terminal operation provides services, such as stevedoring, line handling, derrick barges, barge fleeting and the like, to shippers with cargo to be handled and transported to and from ships, barges and railcars. Ormet charges fees for these services, and the Commission, which receives approximately $300,000 per year from Ormet as rent for the terminal, has never regulated these charges.

Both the docking and the undocking of the vessels require harbor tug service.[2] Before May 1995, the harbor tug service for the terminal was provided by four companies that vigorously competed for the business. The owner of each vessel arranged for its own tug service and negotiated the price and terms of payment with the towing company of its choice.

In April 1995, Ormet decided to provide its own harbor tug service at the terminal after observing the success of a competing private terminal which initiated the exclusive use of a designated towing company in order to avoid costly delays and wharf damage caused by inefficient or negligent harbor tugs. Ormet announced to vessel owners and agents that "[e]ffective May 1, 1995, all vessels must arrange for 'our' tugs when docking/undocking or any other activity requiring tug service. NO

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[2] Harbor tug service is required because the vessels are unable to maneuver into position alone, being unable to navigate laterally in the fast-moving current of the lower Mississippi River. The services of at least two harbor tugs are required per vessel that docks at the terminal.

OUTSIDE TUGS EFFECTIVE 05/01/95." Since Ormet had no tugs or crew for furnishing this service, it chose to seek bids for the service. Bisso Towing Company was the low bidder, and Ormet entered into a "non-exclusive" contract with Bisso,[3] who established a permanent base near the terminal with several tugs and crews available for service. Under this contractual arrangement, Ormet paid Bisso $1,100 per tug for the service and charged shippers a fixed price of $1,450 per tug.[4] Thus Ormet charges shippers a fee for providing this service, just as it charges fees for other services provided to shippers, and makes a profit on providing the service.

In August 1995, plaintiffs, after unsuccessfully seeking relief from the Commission,[5] filed this action alleging they were improperly denied access to the terminal and were damaged economically. Plaintiffs requested injunctive relief on the basis that Ormet's contract with Bisso was illegal and contrary to public policy. Among other things, plaintiffs asserted that Ormet's requirement for vessels to use only its tugs violates the Commerce Clause

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[3] The contract provides that Ormet is not obliged to use Bisso tugs and that either Bisso or Ormet may contract with other tug companies if the need arises. However, Ormet conceded that it currently uses only Bisso tugs, assertedly in order to take advantage of the benefits of a single harbor boat service.

[4] Although disputed, there is evidence that the $1,450 charge is a competitive rate.

[5] A month before this action was filed, plaintiffs and several shippers and agents presented to the Commission their objections to Ormet's arrangement. Deciding that Ormet was not violating its lease, the Commission tabled further consideration of the issues.

in that "[r]equiring carriers to buy Ormet's harbor tug services is equivalent to assessing a license fee for the privilege of using the public Burnside Terminal."

The district court, after an extensive hearing, denied the request for injunctive relief. While noting concerns that the contract was "about as exclusive an arrangement as I can imagine," the district court nevertheless found no violation of the Commerce Clause and no other legal basis for granting the relief sought by plaintiffs.

On appeal, plaintiffs argued that the stifling of competition in favor of Bisso adversely affected tug services used in interstate commerce. Plaintiffs relied on the decision in *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994), which held that a municipal ordinance requiring all nonhazardous solid waste leaving the city to be sorted at a transfer station built by the city and operated by a designated private contractor, although allegedly intended to preclude unprocessed garbage from entering the stream of commerce, effectively prevented everyone but the favored local operator from performing the initial processing.

The court of appeal affirmed. 96,1333 (La. App. 1st Cir. 5/9/97); 694 So.2d 1121. Rejecting plaintiffs' argument, the intermediate court held that *Carbone* did not avail plaintiffs in establishing a violation of the Commerce Clause,[6] reasoning:

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[6] While the court of appeal also addressed several other issues raised by plaintiffs, our grant of certiorari in this case limited argument to the Commerce Clause issue. We thus do not address the other issues.

> The instant case can be distinguished from the facts presented in *Carbone*, because *Ormet's policy of requiring vessels which call at its terminal to utilize its tug services does not regulate* or impede the free flow of *commerce* passing through the terminal, but rather, seeks to facilitate and improve the overall efficiency and profitability of terminal operations. This is achieved by avoiding the potential for costly delays in tug assistance, and reducing the risk of damage to vessels and the terminal itself through the use of regular tug crews who are intimately familiar with the particular river currents and eddies which may be encountered by vessels entering or leaving the dock.
>
> While there can be no doubt that tug policy adopted by Ormet results in a nominal increase in shipping costs, it is the opinion of this court that its effects on interstate commerce are merely incidental. Because said policy has been applied in an even-handed manner to all vessels calling at the Burnside terminal, we believe the overall benefits to both shippers and the terminal cannot be held to violate the dormant provisions of the commerce clause.

96,1333 at 12-13; 694 So.2d at 1129. (emphasis added). Thus the court of appeal premised its holding, in part, on the absence of any regulation of commerce.

We granted certiorari to address the Commerce Clause issue. 97-1531 (La.10/10/97); 703 So.2d 588.

The Commerce Clause

The Commerce Clause provides that "Congress shall have Power . . . To regulate Commerce with foreign

Nations, and among the several States. . . . " U.S. Const. art. I, § 8. On its face, the Commerce Clause simply empowers Congress to regulate interstate commerce. This clause, however, historically has been construed as not only empowering Congress, but also limiting the states. *Cooley v. Board of Wardens,* 12 How. 299, 13 L.Ed. 996 (1852); *see generally* Laurence H. Tribe, *American Constitutional Law* §§ 6.3-6.4 (2d ed.1988). The latter limiting aspect is referred to as the dormant Commerce Clause.

Under the dormant Commerce Clause, there is a "virtually *per se* rule of invalidity" applicable to state regulations that directly discriminate against interstate commerce – i.e., favor in-state over out-of-state economic interests. *City of Philadelphia v. New Jersey,* 437 U.S. 617, 624, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978) (striking down a New Jersey law that barred local landfills from importing out-of-state wastes). The dormant Commerce Clause also invalidates state regulations that indirectly discriminate if the regulation imposes an undue burden on interstate commerce. *Hughes v. Oklahoma,* 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979). The criteria for determining what constitutes "undue" include:

> (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Hughes, 441 U.S. at 336; *see also Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

Historically, the Commerce Clause has been utilized principally in cases involving state taxes and regulatory measures "impeding free private trade in the national market place." *Reeves, Inc. v. Stake*, 447 U.S. 429, 437, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980); Tribe, *supra*, § 6-11, p. 431. The Court, in focusing on cases of Commerce Clause violations by state or municipal action in enacting statutes or ordinances, developed an exception when the action by the government is as a market participant, akin to a private party, as opposed to a market regulator. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 822 n. 4, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976) (Brennan, J., dissenting). Explaining this exception, the Court has stated:

> There is no indication [in the Commerce Clause] of a constitutional plan to limit the ability of the States themselves to operate freely in the free market. . . . Restraint in this area is also counseled by considerations of state sovereignty . . . and "the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." Moreover, state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause.

Reeves, 447 U.S. at 436-38.

Stated otherwise, "[w]hen a state government regulates or taxes, it turns over nothing that belongs to it; rather, it compels private action through the exercise of raw governmental power. In contrast, when a state government buys or sells, it is controlling and distributing its own resources." Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 Mich. L. Rev. 395, 422 (1989). The distinction between a state's regulating and taxing, as opposed to a state's buying and selling, often is the focal point courts consider when addressing the threshold question of the existence of a governmental regulation of commerce in applying the dormant Commerce Clause analysis.

State Regulation

The dormant Commerce Clause applies only to "state regulation" that burdens interstate commerce and not to burdens imposed by private actors. *Note*, Kevin W. Barrett, *Federal Limitations on Target Defensive Tactics: Applying* Edgar v. Mite Corp. *to the "Private Conduct" of Target Directors*, 64 Wash. L. Q. 1187, 1195 (1986). While Ormet is a private party, the Commission is a public body, and its acts are those of a state actor subject to constitutional constraints. The issue is whether the Commission violated Commerce Clause constraints either by its own actions or its inaction in failing to prohibit the enforcement of Ormet's contract that allegedly regulates commerce in an unconstitutional manner.

Defendants argue that the Commission's actions in this case are subject to market participant exception because the Commission acted solely as the lessor of the

terminal and, in that role, was a market participant. Plaintiffs counter that the Commission's action was one of "provid[ing] the marketplace itself," which was held to fall outside the scope of the market participant exception in *Smith v. Department of Agriculture of the State of Georgia*, 630 F.2d 1081, 1083 (5th Cir.1980), *cert. denied*, 452 U.S. 910, 101 S.Ct. 3040, 69 L.Ed.2d 412 (1981).

In *Smith*, the State of Georgia promulgated a preference in its farmers' market for in-state growers in renting out prime spaces at the market. The Court characterized the state's role as a "hybrid" one of providing "the marketplace" for buying and selling, reasoning that while the state owned, operated and partially financed the market, the state did not engage in buying and selling of the farm products sold there, but "simply provided a suitable marketplace for the buying and selling of privately owned goods." 630 F.2d at 1081. Thus the Court held that the State was not a market participant and the exception was inapplicable to the Commerce Clause analysis of the governmental regulation that favored local farmers.

The *Smith* decision is distinguishable from the instant case in that it involved a preferential regulation directly issued by the State of Georgia. There was no such direct regulatory action by the Commission in this case. The Commission's actions, merely as the lessor of a marine terminal, were those of a market participant, in competition with other terminals, rather than a market regulator. Plaintiffs have failed to establish any action by the Commission that constitutes market regulation on which to base a Commerce Clause challenge.

The issue as to the Commission's inaction is whether the private contractual arrangement between Ormet and Bisso is so sufficiently connected to the Commission's regulatory role as to constitute state regulation.

State action questions arise when the entity who allegedly violated the Constitution claims it was not acting on the government's behalf. A private actor is free to determine with whom to deal and to fix the terms under which to buy and sell in the marketplace. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940).[7]

Plaintiffs contend that discrimination by a private lessee on state-owned property can constitute unconstitutional state action when there is a symbiotic relationship between the private lessee and the public lessor. A "symbiotic relationship" is said to exist when the actions provide such tangible aid to both the alleged private wrongdoer and the government that the state and private actor become, in effect, "joint venturers" and the alleged wrongdoer's beneficial ties to the state justify subjecting its actions to constitutional scrutiny. John E. Nowak et al., *Constitutional Law* 513-14 (2d ed.1983).

Here, plaintiffs argue that a symbiotic relationship exists between Ormet and the Commission based on the following factors: (1) the public ownership of the terminal; (2) the lease requirements imposed on Ormet to make

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[7] This distinction between proprietary participation in the market and state regulation is also the basis for the market participation exception discussed elsewhere in this opinion.

the terminal available to the public "without undue discrimination"; (3) the Commission's statutory obligations under La.Rev.Stat. 34:1223C and E to "regulate the commerce and traffic within such port area in such a manner as may, in its judgment, be for the best interest of the state" and not to grant an exclusive franchise to any carrier; and (4) the Commission's collection of sizeable annual rent from Ormet. In support of this contention, plaintiffs cite the seminal case on symbiotic relationship, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

The *Burton* case, like the present case, involved a private party leasing from the state a building constructed by the state and receiving privileges from the state. However, the similarity ends there. *Burton* raised the entirely different legal issue of whether the private party lessee's racially discriminatory action could be the subject of Fourteenth Amendment scrutiny. Holding that the lessee's discriminatory action was not "so purely private" as to fall outside the broad reach of the Fourteenth Amendment, the Court concluded that the public lessor's inaction amounted to condoning the discriminatory decision and rendered the private lessee and the public lessor joint participants in the constitutional transgression. Moreover, the Court was careful to confine its decision to the facts and circumstances of the case, stating that it was not rendering a decision applicable to all state lease arrangements and commenting that state action

decisions were to be made ad hoc by "weighing circumstances."[8] 365 U.S. at 722.

While the state action concept was broadly construed in *Burton* to apply to state inaction, that result may be attributable to the broad constitutional language empowering Congress to enforce the Fourteenth Amendment by all appropriate means. The Commerce Clause contains no such language. Indeed, Commerce Clause analyses historically have been directed at state action taken in a sovereign capacity.[9]

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[8] State action for Commerce Clause purposes arguably may be narrower than state action for Fourteenth Amendment purposes for two reasons:

> First, the values at stake for the latter purposes may strike the Court as of a higher order of importance than those at stake for the former purposes particularly given Congress' authority and capacity to act under the commerce clause if the Court errs in favor of the state. . . . Second, the states may be viewed as the primary lawmakers in ordering and structuring private activity – that is, in enabling private conduct. The states' role in providing structures for "private law" would be threatened by an expansive version of state action doctrine in this context.

Paul N. Cox, *The Constitutional "Dynamics" of the Internal Affairs Rule – A Comment on CTS Corporation*, 13 J. Corp. L. 317, 344 n. 153 (1988).

In an analogy between state action under the Fourteenth Amendment and state regulation under the Commerce Clause, it is important to consider that the particular constitutional right at issue fixes the "parameters" of state action. Tribe, *supra* at § 18-3.

[9] In any event, the precedential value of *Burton*, even in the traditional Fourteenth Amendment state action setting, may be

The Court took a narrower view of state action which is a product of a private actor's decision in *San Francisco Arts & Athletics v. Olympic Committee*, 483 U.S. 522, 107 S.Ct. 2971, 97 L.Ed.2d 427 (1987). There, the Court declined to find a symbiotic link between the Olympic Committee, which was a privately incorporated entity, and the government. The Court noted that it "has held that a government 'normally' can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be that of the [government.]" 483 U.S. at 546 (collecting cases). Absent that degree of " 'close nexus' between the [government] and the challenged action," the challenged action cannot be characterized as state action. 483 U.S. at 547 n. 29. Hence, when the private entity's decision is, at most, merely approved by or acquiesced in the government, the private entity's action likely will not be characterized as state action.

The reasoning of the *Olympic Committee* decision applies here. Plaintiffs have not alleged that the Commission compelled or encouraged Ormet's harbor tug contract. Plaintiffs have alleged only that the Commission's refusal to prohibit, and its consequent acquiescence in, the contract constituted state regulation. This acquiescence alone, under the facts and circumstances of this

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questionable in light of the Court's passing footnote reference to it in the subsequent case of *San Francisco Arts & Athletics v. Olympic Committee*, 483 U.S. 522, 107 S.Ct. 2971, 97 L.Ed.2d 427 (1987). *See* Tribe, *supra* at § 18-3 n. 13 (noting that *Burton* has often been cited but seldom followed).

case, is insufficient to amount to state regulation for purposes of Commerce Clause analysis.

We conclude that neither the Commission's actions as lessor nor its acquiescence in Ormet's private contract is state regulation that violates the Commerce Clause.

Decree

For the foregoing reasons, the judgments of the lower courts are affirmed.

KNOLL, Justice, dissenting.

For the following reasons, I respectfully dissent from the majority's determination that there was no State action on the part of the Baton Rouge Port Commission and, even if there was, that it acted as a market participant, not a market regulator.

The majority ignores that Louisiana's history and economy are closely tied to the Mississippi River, and because of that relationship, the state "jealously guards against impediments to the river's commerce." *Wood Marine Service, Inc. v. City of Harahan*, 858 F.2d 1061, 1064 (5th Cir.1988). It is likewise evident that the United States national government recognized the significance of the Mississippi River, as seen when Louisiana was admitted to the Union, Act of Feb. 20, 1811, codified 33 U.S.C. § 10, it conditioned statehood on the proviso that "[a]ll the navigable rivers and waters in the Territory of Orleans and Louisiana shall be and forever remain public highways." Correlatively, it is well recognized that the power of the United States over its waters which are capable of use as interstate highways flow from the Commerce

Clause of the Constitution. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 61 S.Ct. 291 (1940). Thus, it was held early in our country's history that the power to regulate commerce necessarily includes the power over navigation. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189, 6 L.Ed. 23 (1824); *Leovy v. United States*, 177 U.S. 621, 20 S.Ct. 797 (1900).

I recall this history, since I find that the case before us essentially involves the navigation of vessels on the public highway of the Mississippi River. Bisso's tugs meet ships at mid-stream and propel them across the water so that they can dock at the Burnside terminal. Likewise, when ships have completed the delivery/loading of their cargo dockside, Bisso's tugs propel them from the Burnside terminal back to mid-stream so that they can again enter the stream of commerce. It is this activity, all of which occurs in the free-flow of the Mississippi River, that Ormet's mandatory tug arrangement affects.

It is conceded that the Burnside terminal processes cargo that is in interstate and foreign commerce. The discrimination that Crescent, ENB, and RivCo identify is that the Ormet-Bisso contract causes the cost to rise for ships from out-of-state to use the terminal and deprives other tug companies from servicing the Burnside terminal. Although I find it unnecessary to enter the fray as to whether costs are indeed higher, since I find that such inquiry distracts from the real discrimination at hand, I choose to focus on the monopolistic control of tug services at a publicly owned facility. With this as my focal point, I find that the Ormet-Bisso contract has upended the way that business has been traditionally conducted and, in the process, has removed competition from the

process of fixing rates that ship owners pay for tug services at this public terminal.[1] The outcome of this contract has deprived everyone but Bisso from serving ships who call on this publicly funded terminal. Furthermore, ships calling on this public terminal have been denied the opportunity to negotiate tug fees and to receive the economic benefits from discounts that they heretofore garnered.

As evidence of my concern, I reference the trial court's poignant commentary on the monopolistic practice Ormet and Bisso entered with the quiet blessing of the Port Commission. Addressing Ormet's anti-competitive contract with Bisso, the trial court recognized that this business arrangement may not be in the best interest of the Port of Baton Rouge. In particularizing this concern, the trial court, paraphrasing Channing Hayden, the president of the New Orleans Steamship Association, said, "[I]f this arrangement is allowed, it very likely might spread, it could have a deleterious effect."

Against this backdrop, I disagree with the majority's determination that the Commission's actions as lessor or its acquiescence in Ormet's private contract do not constitute state regulation that violates the Commerce Clause scrutiny.

It is well recognized that the Commerce Clause grants to Congress and correspondingly withholds from

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[1] Although, as adroitly pointed out by Ormet and the Port Commission, no ship owners or their agents are parties to this litigation, the record bears out that complaints about the Bisso contract were raised from these quarters in the hearing before the Port Commission's executive committee.

the various states the power to regulate commerce among the several states. U.S. Const. Art. I, § 8. Because the authority which the Constitution confers is the power to regulate, the dictates of the dormant Commerce Clause are not activated unless state action may be characterized as a regulation. *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2nd Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1453 (1996).

I agree with Crescent, ENB, and RivCo that the public ownership of the land and terminal and Ormet's obligations under its lease with the Port Commission constitute the grounds for finding tangential state action which would invoke the dormant Commerce Clause. Pursuant to La. R.S. 34:1223(C), "[t]he [port] commission shall regulate the commerce and traffic within such port area in such a manner as may, in its judgment, be for the best interest of the state." In furtherance of this statutory obligation, Ormet agreed in its lease with the Port Commission to make the Burnside terminal available to the public "without undue discrimination." From this it can be readily seen that there exists a symbiotic relationship between the Port Commission and Ormet. Thus, I find that Ormet's use of the Burnside terminal is intertwined with public use.

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856 (1961), the United States Supreme Court held that a municipal landlord cannot permit its private tenants to discriminate in violation of the constitution. There the Wilmington Parking Authority, a state agency, leased space in a publicly owned parking facility to a restauranteur. When the restaurant refused to serve Burton solely because of his race, the patron, naming both

the parking authority and the private lessee, sought declaratory and injunctive relief to end the discrimination. Addressing the question of whether this private discrimination constituted state action, the *Burton* Court held that "no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be." *Id.*, 365 U.S. at 725, 81 S.Ct. at 861. Moreover, the Court held that "[b]y its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination." *Id.*, 365 U.S. at 725, 81 S.Ct. at 862.

Although *Burton* was decided under the Fourteenth Amendment, I find its analysis applicable to the facts herein. Ormet agreed in its lease of this public facility not to unduly discriminate. Accordingly, I find that Ormet may not take solace in its characterization as a private corporation, reap the benefits of its leasehold of a publicly funded terminal, and yet attempt to insulate itself from the implications of the Commerce Clause. In like manner, the Port Commission is duty-bound to operate the Burnside terminal with the State's best interest in mind. Accordingly, I find that the Port Commission may not shirk its statutory duties by using Ormet as a shield.[2] Therefore, I find that Ormet and the Port Commission

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[2] In the original lease agreement with Ormet, all rules, regulations, tariffs, rates and charges for use of the Burnside terminal were subject to the approval of the Port Commission. By addendum dated January 1, 1992, the Port Commission and Ormet deleted that portion which required the Port Commission's approval.

have acted to regulate interstate commerce under the dormant Commerce Clause.

I further disagree with the majority's determination that the Port Commission is immune from scrutiny under the Commerce Clause because the Port Commission as a landlord is acting as a market participant, not a market regulator.

> At the threshold of its Commerce Clause analysis, the Supreme Court has drawn an important distinction between "regulation" of, and "participation" in, a market. When a state engages in market "participation" – that is, *when it enters the open market as a buyer or seller on the same footing as private parties* – there is less danger that the state's activity will interfere with Congress's plenary power to regulate the market. As the Court has explained, the Commerce Clause "restricts 'state taxes and regulatory measures impeding free private trade in the national marketplace,' but '[there] is not indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.' "

SSC, 66 F.3d at 510, citing *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 289, 106 S.Ct. 1057, 1062 (1986) (quoting *Reeves Inc. v. Stake*, 447 U.S. 429, 437, 100 S.Ct. 2271, 2277 (1980)). (Emphasis added).

In the present case, it is evident that the Port Commission is not just a landlord, seeking to earn rental revenues from the wise investment of its property. Unlike private landlords, the Port Commission is constrained to operate the Burnside terminal with the State's best interest in mind, La. R.S. 34:1223(C), and is prohibited from

granting an exclusive franchise to any carrier, La. R.S. 34:1223(E). Thus, I find, unlike the majority, that the Port Commission is a "market regulator."

I further note that although the Port Commission was authorized to enter into a lease agreement with Ormet for the Burnside terminal, nowhere in the lease was Ormet granted authority beyond the public facility. Specifically, I point out that the Port Commission leased to Ormet particularly described immovable property in Ascension Parish, together with a ship and barge dock and all improvements located thereon. By seeking to control tugboat and steamship operations on the Mississippi River, it is evident to me that Ormet has attempted to extend the tentacles of the lease into a realm over which it has no authority. Thus, I find that Ormet has exceeded the authority granted it under the lease agreement and has impermissibly regulated navigation on the Mississippi River thereby burdening the free flow of interstate commerce.

Moreover, it is clear to me that this exclusive arrangement profoundly impacts interstate commerce by regulating the market between the tugboat and steamship industry in this aspect of navigation and is thereby directly burdened. Simply stated, the exclusive contract between Ormet and Bisso discriminates against the stream of interstate commerce because it mandates that only the favored operator, Bisso, may provide tug service to vessels in interstate commerce who utilize a public owned facility. In this regard, I find that the Commerce Clause protects the interstate market, i.e. the unfettered use of the public terminal by interstate shippers on the Mississippi River, not just the tug companies who compete to serve the interstate carriers. *Compare Exxon Corp.*

v. Governor of Maryland, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978).[3]

Lastly, I find that it is significant that Ormet retains $350 from the amount charged shipowners for the use of each Bisso tug assisting in docking and undocking at the Burnside terminal and that Bisso is paid only $1,100 for the tug services it provides ships utilizing this public facility. As admitted in Ormet's brief, "[t]erminal management sought to improve the terminal's efficiency and safety *and to make a profit on the services as well.*" In *C & A Carbone*, the Supreme Court stated that "[d]iscrimination against interstate commerce in favor of local business or investment is *per se* invalid,. . . . " *C & A Carbone*, 511 U.S. at 392, 114 S.Ct. at 1683. Applying this proposition to the present case, I further find that the imposition of this fee benefits a local actor, Ormet, to the detriment of interstate commerce. Thus, I find that it has been demonstrated that Ormet's exclusive contract with Bisso both discriminates against and burdens interstate commerce.

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Justice Johnson also dissented, without assigning written reasons.

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[3] I further observe that the end result in the *Exxon Corp.* case was that competition was encouraged. In the present case, competition is squelched.

APPENDIX B

SUPREME COURT OF LOUISIANA

No. 97-C-1531
703 So.2d 588

Crescent Towing & Salvage Co., Inc. and
E.N. Bisso & Son, Inc.,
Plaintiffs-Petitioners,

v.

Ormet Corporation and The Greater Baton
Rouge Port Commission,
Defendants-Respondents.

On Writ of Certiorari to the Court of Appeal,
First Circuit, Parish of East Baton Rouge.

In re Crescent Towing & Salvage Co., Inc.; E.N. Bisso & Sons, Inc.; – Plaintiff(s); applying for writ of certiorari and/or review; to the Court of Appeal, First Circuit, Nos. CA96 1332, CA96 1333; Parish of East Baton Rouge, 19th Judicial District Court, Div. "H", No. 419,211.

Granted (Argument limited to Interstate Commerce issue).

VICTORY, J., not on panel.

APPENDIX C

COURT OF APPEAL OF LOUISIANA,
FIRST CIRCUIT

No. 96 CA 1333
694 So.2d 1121
(Argued: March 31, 1997; Decided May 9, 1997.)

Crescent Towing & Salvage Co., Inc. and
E.N. Bisso & Son, Inc.,
Plaintiffs-Appellants,

v.

Ormet Corporation and The Greater
Baton Rouge Port Commission,
Defendants-Appellees.

On Appeal to the Court of Appeal, First Circuit

Before: Lottinger, C.J., and Foil and Fogg, JJ.

LOTTINGER, Chief Judge.

In this action, various towing companies seek to enjoin the port commission and the lessee of its terminal from requiring ships calling at the terminal to utilize in-house tugboat services provided by a competitor. Following the district court's denial of their request for preliminary and permanent injunctions, the towing companies have appealed.

Facts

The Greater Baton Rouge Port Commission (hereinafter, "Port Commission"), a named defendant herein, owns a bulk cargo terminal situated on the east bank of the Mississippi River at Burnside, Louisiana. The Burnside terminal was constructed in the late 1950's by Olin Matheson Chemical Corporation (hereinafter, "Olin Matheson"). Upon its completion, Olin Matheson sold the terminal to the Port Commission which financed its acquisition through the issuance of general obligation bonds. Following its purchase of the Burnside terminal, the Port Commission leased this facility to Olin Matheson for use in connection with its adjacent plant facility.

The Burnside terminal is a public marine terminal designed to assist shippers of bulk cargo in the loading and off-loading of their goods to and from ships and barges. For a fee, the terminal provides various services including line handling, cargo stevedoring, and fresh water and barge shifting. Under the terms of the lease agreement, the terminal lessee may use and operate the terminal primarily for its own business requirements as well as those of its subsidiaries. To the extent the terminal is not required for the lessee's business purposes, it is available for use by others "without undue discrimination." The current lessee of the Burnside terminal is defendant, Ormet Corporation (hereinafter, "Ormet"), an assignee of Olin Matheson.[1] Ormet also operates an adjoining alumina plant.

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[1] The record reflects that Ormet pays the Port Commission about $300,000.00 a year in connection with its lease of the Burnside terminal.

Approximately fifteen ships a month call at the Burnside terminal. Generally, each of these ships require two or more tugs to assist them from the middle of the river to a berth at the dock, and a similar number upon their departure. Traditionally, the selection of a tug company was left to the ship's owner or his agent. Due to the highly competitive market for tug services, it was not uncommon for a ship owner or agent to obtain, through negotiation, a discounted rate from the tug company's published tariff rates. The ship or its charterer would thereafter be billed directly by the tug company, who would generally extend credit terms of sixty days or more. Four tug companies, namely, plaintiff-appellants, Crescent Towing & Salvage Co., Inc. (hereinafter, "Crescent") and E.N. Bisso & Son, Inc. (hereinafter, "ENB"); intervenor-appellant, River Parishes Company, Inc. (hereinafter, "RivCo"); and defendant-appellee, Bisso Towboat Co. (hereinafter, "Bisso") heretofore competed for the business of docking and undocking ships calling at the Burnside terminal.

The present dispute arose when Ormet, the present lessee of the Burnside terminal, in a letter to ship owners and agents dated April 19, 1995, advised that effective May 1, 1995, all vessels calling at the Burnside terminal must arrange to use its tug service when docking, undocking or performing any other activity requiring tug service. Because Ormet does not own any tugs, it entered into a "non-exclusive" contract[2] with Bisso to

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[2] The contract is "non-exclusive" to the extent that Ormet is not obliged to utilize Bisso tugs, and in the event Bisso is unable to perform its duties under the contract, Ormet or Bisso may

provide tug services to ships calling at the Burnside terminal.

Under the system implemented by Ormet, Ormet books the tug service directly with the ship owner or his agent, and retains for itself a portion of the non-negotiable tug fee. Additionally, Ormet now bills for tug services in advance. As a result of this contract, Bisso, which by its own admission, previously enjoyed only 20-25% of the tug service at Burnside, has dramatically increased its share of the market through the exclusion of its competitors. Bisso now bills Ormet directly for the tug services rendered, and receives payment within forty-five days.

After implementation of the contract and approximately one month before plaintiff-appellants instituted the present action, representatives of Crescent, ENB and RivCo, together with a representative of the New Orleans Steamship Association, presented their objections and arguments at a meeting of the Executive Committee of the Port Commission. A representative of Ormet was also present and explained the company's contract with Bisso. The commission, after seeking the advice of its counsel, decided that Ormet was not in violation of its lease, and decided to table further consideration of the issues.

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contract with other tug companies. Nevertheless, Ormet concedes that it is currently using only tugs provided by Bisso, and that vessels calling at the Burnside terminal are required to use Bisso tugs.

Action of the District Court

Crescent and ENB filed this action for injunctive relief alleging that Ormet's contractual relationship with Bisso has deprived them of access to Burnside's public terminal, and caused them irreparable harm including the loss of customers, profit and goodwill. Through a subsequently filed intervention, RivCo joined with Crescent and ENB in their effort to have Ormet's contract with Bisso declared illegal and contrary to public policy. Following a three day hearing, the district court, while expressing concern over what it found to be "about as exclusive an arrangement as I can imagine," declined to issue a preliminary injunction. Following the denial of their request for a preliminary injunction, the parties stipulated to the entry of a judgment as to plaintiff-appellants' entitlement to permanent injunctive relief based upon the transcript and other testimony adduced at the preliminary injunction hearing. The request for a permanent injunction was denied. From these judgments, plaintiffs and intervenor (hereinafter collectively referred to as "appellants") have appealed.[3]

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[3] Appellants in this matter have appealed both the denial of their request for a preliminary injunction as well as the court's subsequent denial of their request for a permanent injunction. Because the parties, the issues and the record are identical in both matters, our decision concerning the denial of appellants' request for a preliminary injunction, Appeal No. 96-CA-1332, simply references this opinion which addresses the denial of their request for a permanent injunction.

Issues Raised on Appeal

On appeal, appellants argue that the district court erred in the following respects:

> 1. In holding that, as a matter of law, Bisso was not a "carrier" within the meaning of La. R.S. 34:1223(E), which prohibits the grant of exclusive franchises to "carriers;"
>
> 2. In holding that the Port Commission had not impermissibly delegated its authority to Ormet;
>
> 3. In holding that the exclusive franchise did not violate state and federal navigational servitudes;
>
> 4. In concluding, as a matter of law, that the Burnside terminal is not a "public utility" that is prohibited from tying the unrelated terminal and harbor tug services together;
>
> 5. In concluding, as a matter of law, that the exclusive franchise granted by Ormet to Bisso with the Port Commission's tacit approval did not violate the federal Commerce Clause.

Discussion

1. *Is Bisso a Carrier?*

In their first assignment of error, appellants assert that the trial court erred in failing to hold that Bisso was a carrier within the meaning of La. R.S. 34:1223(E). That statute, which relates to the rights and powers of the Port Commission, provides:

> E. The commission shall have authority to make and enter into contracts, leases and other agreements with railroads, trucking companies,

> barge lines and with any and all companies interested in the transportation, storage and shipping of goods and other products, whether by rail, truck line, barge line, ocean going vessels or otherwise for the use of facilities administered by the commission or any part or portion thereof, for a period of time not exceeding forty years. *No exclusive franchise, however, shall be granted to any carrier.* (emphasis supplied).

Appellants assert that tugs assisting ships at the Burnside terminal are carriers in that they help transport shipboard cargo from the navigable channel of the Mississippi River to the dock. For this reason, Ormet's exclusive use of Bisso tugs at the Burnside terminal violates the provisions of the above-quoted statute. Appellants argue that because ships lack the lateral propulsion necessary for docking operations, tugs, when they are assisting ships, become an essential part of the ship's navigational system, and essentially, the two vessels become "one unit at that point." Appellants further argue that when ships approach the terminal, they are more akin to unpowered barges, and that hence, the tugs become carriers.

In response to this argument, appellees assert that La. R.S. 34:1223(E) makes it clear that the carriers described in this statute are only those that transport cargo. Appellees argue that the above-quoted language of that section sets forth the traditional types of carriers, i.e., those that transport cargo from one place to another, and it is these entities to which the statute refers when it states that "[n]o exclusive franchise may be granted to any carrier."

The statute, as interpreted by appellees, would permit the Port Commission to enter into agreements with traditional carriers as well as those companies such as Ormet who are "interested" in the transportation, storage and shipping of goods; however, the Commission would be specifically precluded from entering into exclusive agreements with traditional carriers. Appellees assert that the legislative purpose behind such a distinction was to insure that carriers who bring cargo to the port do not also control the port's terminals.

As the district court observed in its reasons for judgment, La. R.S. 34:1223(E) does not define the term "carrier." While we can find no cases or other authority which would be dispositive of the question of whether a harbor tug is indeed a carrier, we note that the term "carrier" generally refers to one who undertakes the transportation of persons or property, or one employed in or engaged in the business of carrying goods for others for hire. *Black's Law Dictionary*, 269 (4th ed.1957). Similarly, in *Higginbotham v. Public Belt Railroad Commission*, 181 So. 65, 69 (Orl. App.1938), *affirmed*, 192 La. 525, 188 So. 395 (1938), the court defined a "carrier" as "one who undertakes to transport persons or property from place to place."

Earlier, in *Bussey & Co. v. Mississippi Valley Transportation Company*, 24 La. Ann. 165, 167 (Orl. App.1872), the court was presented with the question of whether a towboat company engaged in the shipment of goods for hire could be considered a common carrier for purposes of tort liability. The court, in its opinion in *Bussey*, noted that while this issue had long been settled in the affirmative in Louisiana, there existed an apparent conflict in the American jurisprudence. Attributing these conflicting views to

the manner in which the towboat was employed, the court went on to distinguish the instance wherein a towboat is "employed as a mere means of locomotion under the entire control of the towed vessel" with the owner of the towed vessel never relinquishing possession and control of the property transported, from the very different situation in which a towboat plies regularly between fixed *termini*, and indiscriminately tows for hire barges laden with goods which are placed under the towboat's full possession and control. The court in *Bussey* concluded that the case before it was analogous to the latter situation, which "seem[ed] to satisfy every requirement in the definition of a common carrier." *Bussey & Co. v. Mississippi Valley Transportation Company*, 24 La. Ann. at 167.

Upon consideration of the foregoing authorities and a review of the record in this matter, it is clear that a ship attempting to enter or leave a marine terminal differs from a barge in that the ship has a rudder, engines, a pilot, a master and a crew. Consequently, tugs do not exercise the same dominion over a ship as they would a barge. Moreover, the accompanying tugs never assume full direction and control over said vessel's cargo, and for this reason, said tugs cannot be considered "carriers" within the meaning of La. R.S. 34:1223(E).

While there can be no dispute that the assistance provided by said tugs is vitally important to the pick-up and delivery of goods, such duties are merely incidental to those of the vessel which is the actual carrier.

Based upon our review of the testimony contained in the record before us, it is clear that the tugs operating at

the Burnside terminal take their directions from the master of the vessel and his pilot who retain ultimate control over the vessel and its cargo. For these reasons, this assignment of error is without merit.

2. *Did the Port Commission Impermissibly Delegate its Regulatory Authority to Ormet?*

Appellants assert in their second assignment of error that in consenting to the addition of Addendum No. 8 to its terminal lease with Ormet, the Port Commission had impermissibly delegated both its regulatory oversight and its limited authority to enter into exclusive franchises.

The record reflects that effective January 1, 1992, the Port Commission and its lessee, Ormet, executed Addendum No. 8 to its original marine terminal lease. Said Addendum No. 8 deleted the previously existing provision that all rules, regulations, tariffs, rates and charges established by Ormet were subject to review and approval by the Port Commission.

In connection with this assignment of error, appellants argue that the addendum grants to Ormet the unfettered authority to promulgate rules and tariffs for the Burnside terminal solely in its own interest without regulatory oversight. Appellants further argue that the Port Commission cannot constitutionally delegate its regulatory oversight authority or its limited power to enter into exclusive franchises.

With regard to the power of the Port Commission to enter into exclusive franchises, both appellants and

appellees cite the case of *Greater Baton Rouge Port Commission v. Cargill Incorporated*, 252 La. 718, 214 So.2d 119 (1968) for the proposition that "a public body has no power to grant an exclusive franchise to private corporations, unless such power has been delegated to it either expressly or by necessary implication under the legislative act." *Cargill*, 214 So.2d at 124. In *Cargill*, the Louisiana Supreme Court addressed the question of whether plaintiff had granted to defendant, a grain company, an exclusive franchise to operate all public grain elevators within the Port of Baton Rouge. In reaching its decision, the court turned to Section 29 of Article VI of the Louisiana Constitution of 1921 which created the Port Commission, and cited with emphasis the following language:

> The Commission shall have the authority to make and enter into contracts, leases and other agreements with railroads, trucking companies, barge lines and with any and all companies interested in the transportation; storage and shipping of goods and other products, whether by rail, truck line, barge line, ocean going vessels or otherwise for the use of facilities administered by the Commission or any part of [sic] portion thereof, for a period of time not exceeding forty (40) years. No exclusive franchise, however shall be granted to any carrier.

Greater Baton Rouge Port Commission v. Cargill Incorporated, 214 So.2d at 125. (emphasis supplied therein).

The court in *Cargill* ultimately concluded that:

> [t]he above quoted constitutional grant of power vested in the Commission to enter into contracts, leases and other agreements necessarily includes by implication the authority to grant

> exclusive privileges in order to carry out the scheme for the development of the Port of Baton Rouge. Indeed, this is made evident by the last sentence of the provision declaring: 'No exclusive franchise, however, shall be granted to any carrier.' This language . . . indicates the intent of the lawmakers that in all other instances, save those involving contracts with carriers, the Port Commission has authority to grant exclusive franchises, rights and privileges.

Greater Baton Rouge Port Commission v. Cargill Incorporated, 214 So.2d at 125.

In its brief to this court, the Port Commission asserts that the supreme court's holding in *Cargill* is similarly applicable to the present case. We agree.

In accordance with Article XIV, § 19 of the Louisiana Constitution of 1974[4], the above-cited provision from the Louisiana Constitution of 1921 was retained and later enacted as La. R.S. 34:1223(E). By virtue of the authority granted to it by R.S. 34:1223(E), the Port Commission was acting within the law when it granted an exclusive contract to Ormet for the operation of the Burnside Terminal. Additionally, and inasmuch as we have previously determined that Bisso was not a "carrier," we must conclude that the Port Commission itself could have similarly granted an exclusive contract to Bisso to provide tug service at said terminal. Therefore, the fact that such a

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[4] Article XIV, § 19 of the Louisiana Constitution of 1974 provides in part that "[a]ll provisions of Article VI, Section . . . 29 . . . of the Constitution of 1921 shall become [a statute] subject to amendment or repeal only as provided in Article VI, Section 43 of this constitution."

contract, exclusive or otherwise, was granted to Bisso by the Port Commission's lessee, Ormet, rather than by the Port Commission itself, appears to be a distinction without a difference.

We turn now to appellants' contention that the Port Commission, through its execution of Addendum No. 8 of the lease agreement, impermissibly delegated its oversight authority to review and approve all rules, regulations, tariffs, rates and charges established by Ormet. In our review of this matter, we note that appellants have failed to cite any applicable authority for the proposition that the Port Commission is charged with the duty to review and approve the rules, regulations, tariffs, rates and charges established by its lessee. While the Port Commission is required by La. R.S. 34:1223(C) to regulate commerce and traffic within the area it serves in a manner consistent with the best interest of the state, we do not believe said statute can be extended to impose upon the Port Commission such oversight measures as it may have once deemed prudent to place in its lease. Absent some showing that its decision to discontinue reviewing and approving the rules and charges of its lessee was inconsistent with its obligation to act in the best interest of the state, we cannot say that the Port Commission impermissibly delegated its oversight authority.

Accordingly, this assignment is without merit.

3. *Does Ormet's Contract with Bisso Violate State and Federal Navigational Servitudes?*

In their third assignment of error, appellants contend that state and federal navigational servitudes prevent

Ormet or the Port Commission from interfering with or restricting the public's right to use the Mississippi River as a highway of commerce. Appellants cite La. Civ. Code art. 452 for the proposition that a river user has the right to "moor ships . . . provided that he does not cause injury to the property of adjoining owners." Appellants further argue that Ormet's contract with Bisso violates state and federal navigational servitudes because it eliminates appellants' right to moor ships at the Burnside terminal thereby creating an "exclusionary zone" around the Burnside terminal.

It is clear from the language of La. Civ. Code art. 450[5] that the water of a navigable river is a public thing subject to public use. Additionally, article 456 provides that the banks of navigable rivers and streams are private things subject to public use. *See* 2 A.N. Yiannopoulos, *Louisiana Civil Law Treatise – Property* § 74 (3rd ed.1991).

In his treatise on Louisiana property law, Professor Yiannopoulos observes that:

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[5] La. Civ. Code art. 450 provides:

Art. 450. Public things

Public things are owned by the state or its political subdivisions in their capacity as public persons.

Public things that belong to the state are such as the running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore.

Public things that may belong to political subdivisions of the state are such as streets and public squares.

> [p]ublic use is generally regarded in Louisiana as a charge in the interest of the public akin to a servitude. It is neither a predial nor a personal servitude, but a *sui generis* burden, which confers on administrative authorities and courts broad powers for the regulation and protection of the rights of the public.

2 A.N. Yiannopoulos, *Louisiana Civil Law Treatise – Property* § 82 p. 167 (3rd ed.1991) (footnotes omitted).

Additionally, La. Civ. Code art. 460 provides in pertinent part:

> Port commissions of the state, . . . may, within the limits of their respective jurisdictions, construct and maintain on public places, in beds of natural navigable water bodies, and on their banks and shores, works necessary for public utility, including buildings, wharves, and other facilities for the mooring of vessels and the loading or discharging of cargo and passengers.

Based upon our reading of the record in this matter, it is clear that the public's right to navigate and utilize the Mississippi River as a highway of commerce has not been physically obstructed. It is also evident that neither Ormet nor the Port Commission has denied the public access to the Burnside terminal. Admittedly, Ormet's contract with Bisso has denied appellants the right to solicit business at the Burnside terminal; however, navigational servitudes protect the public's right to utilize the river and the bank for navigation and commerce, not the business relationships of private business interests.

For the foregoing reasons, we conclude that this assignment of error is without merit.

4. *Is the Burnside Terminal a Public Utility?*

In their fourth assignment of error, appellants claim that the district court erred when it concluded that the Burnside terminal was not a "public utility" that is prohibited from tying together unrelated terminal and harbor tug services.

To support their claim that the Burnside terminal is a public utility, appellants cite *Morehouse Natural Gas Co., Inc. v. Louisiana Public Service Commission*, 242 La. 985, 140 So.2d 646, 651 (1962), for its definition of a public utility, i.e. "a business organization which regularly supplies the public with some commodity or service". Claiming that the "Burnside Terminal easily fits this definition", appellants go on to analogize the facts of the instant case to those presented in *Hicks v. City of Monroe Utilities Commission*, 237 La. 848, 112 So.2d 635 (1959).

In *Hicks*, the City of Monroe sought to charge a higher rate for water to customers located outside of the city limits who took water service only, than it charged to similarly situated customers who took both water and electric power. The supreme court, in affirming the appellate court, quoted from the appellate court opinion and held that "a public utility, whether privately or municipally operated, has no right to condition its service or its rates upon collateral matters not connected with the furnishing of the particular service involved." *Hicks v. City of Monroe Utilities Commission*, 112 So.2d at 652. Appellants argue that like the water utility in *Hicks*, Ormet is attempting to tie its core service (ship loading and unloading) to an unrelated service (harbor tug service).

Appellants' argument fails in that appellants have not shown that a marine terminal, like the one Ormet operates at Burnside, is a public utility under Louisiana law. Moreover, appellants have conveniently ignored the statutory definition of "public utility" set forth in La. R.S. 45:1161. That statute provides in pertinent part that a "public utility" refers to:

> any person, public or private, subject to the general jurisdiction of the [Louisiana Public Service] commission but not including carriers by rail, water, electric or motor vehicles or pipelines, or public utilities municipally owned, or operated, or regulated, unless the electors of such municipality, and electors residing outside the municipality, who are customers of the municipally owned utility, have manifested their approval of such jurisdiction as is required by Article IV, Section 21(C) of the Constitution of Louisiana in the manner provided by R.S. 45:1164.1 through 45:1164.13.

Additionally, R.S. 45:1163 provides that the Public Service Commission "shall exercise all necessary power and authority over any street railway, gas, electric light, heat, power, waterworks, or other local public utility" for the purpose of regulating the rates and services provided by said public utilities.

It should also be noted that throughout its many sections, Title 45 of the Louisiana Revised Statutes lists the various public utilities and carriers. Such entities include: airplanes, canals, electricity, motor carriers, pipe lines, railroads, street railroads, telegraphs and telephones, radio and television, and news media. *See* La. R.S. 45:1-1504. Nowhere in Title 45 are marine terminals

and/or tugs mentioned in reference to either a public utility or a carrier.

Absent some authority to show that the Burnside terminal qualifies as a public utility under the laws of this state, we cannot say that Ormet impermissibly "tied" together unrelated services. For this reason, this assignment of error is without merit.

5. *Do Ormet's Actions Violate the Commerce Clause?*

In their fifth and final assignment of error, appellants claim that Ormet's anti-competitive tug contract with Bisso unduly burdens and discriminates against interstate commerce in violation of the United States Constitution. Appellants argue that the removal of competition among tug companies at the Burnside terminal has resulted in artificially high fees for tugs services thereby imposing higher costs on shipping interests without any corresponding benefit.

In support of their Commerce Clause argument, appellants rely primarily upon *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994). In *Carbone*, the Supreme Court was asked to consider a Clarkstown, New York ordinance which required that all nonhazardous solid waste generated or brought into the town be deposited at a transfer station built and operated by a designated private contractor for sorting and eventual disposal. While the avowed purpose of the ordinance was to prevent garbage from entering the stream of commerce until it had been properly treated, the effect was to prevent everyone but the favored local operator from performing the initial

processing step. In striking down the ordinance, the Court held that it violated the implied provisions of the commerce clause by hoarding solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility.

The instant case can be distinguished from the facts presented in *Carbone*, because Ormet's policy of requiring vessels which call at its terminal to utilize its tug services does not regulate or impede the free flow of commerce passing through the terminal, but rather, seeks to facilitate and improve the overall efficiency and profitability of terminal operations. This is achieved by avoiding the potential for costly delays in tug assistance, and reducing the risk of damage to vessels and the terminal itself through the use of regular tug crews who are intimately familiar with the particular river currents and eddies which may be encountered by vessels entering or leaving the dock.

While there can be no doubt that tug policy adopted by Ormet results in a nominal increase in shipping costs, it is the opinion of this court that its effects on interstate commerce are merely incidental. Because said policy has been applied in an even-handed manner to all vessels calling at the Burnside terminal, we believe the overall benefits to both shippers and the terminal cannot be held to violate the dormant provisions of the commerce clause. We must conclude that this assignment of error is also without merit.

Conclusion

For the reasons set forth above, the judgment of the district court denying the request by plaintiff-appellants, Crescent Towing & Salvage Co., Inc. and E.N. Bisso & Son, Inc., and intervenor-appellant, River Parishes Company, Inc., for a permanent injunction against defendant-appellees, Greater Baton Rouge Port Commission and Ormet Corporation, is hereby affirmed. All costs associated with this appeal shall be assessed against appellants, Crescent Towing & Salvage Co., Inc. and E.N. Bisso & Son, Inc.

AFFIRMED.

APPENDIX D

NOT DESIGNATED FOR PUBLICATION

COURT OF APPEAL OF LOUISIANA,
FIRST CIRCUIT

No. 96 CA 1332
(Argued: March 31, 1997; Decided May 9, 1997.)

Crescent Towing & Salvage Co., Inc.
and E.N. Bisso & Son, Inc.,
Plaintiffs-Appellants,

v.

Ormet Corporation and The
Greater Baton Rouge Port Commission,
Defendants-Appellees.

On Appeal to the Court of Appeal, First Circuit

Before: Lottinger, C.J., and Foil and Fogg, JJ.

LOTTINGER, Chief Judge.

In this action, various towing companies seek to enjoin the port commission and the lessee of its terminal from requiring ships calling at the terminal to utilize in-house tugboat services provided by a competitor. Following the district court's denial of their request for a preliminary injunction, the towing companies now appeal.

For the reasons assigned in *Crescent Towing & Salvage Co., Inc. and E.N. Bisso & Son, Inc. v. Ormet Corporation* and *The Greater Baton Rouge Port Commission,* No. 96 CA 1333, decided this date, the ruling of the district court denying

plaintiffs and intervenor's request for a preliminary injunction is hereby affirmed. All costs associated with this appeal are assessed against plaintiffs and intervenor.

AFFIRMED.

APPENDIX E

19th JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE, LOUISIANA

No. 419-211, Division H, Section 15

Crescent Towing & Salvage Co., Inc.
and E.N. Bisso & Son, Inc.,
Plaintiffs,

v.

Ormet Corporation and The
Greater Baton Rouge Port Commission,
Defendants.

Edited Oral Reasons for Judgment*
Tuesday, October 17, 1995
the Honorable J. Michael McDonald,
Judge Presiding

BY THE COURT:

In this regard, the court recalls Mr. Hayden, the president of the Steamship Association, whose comment was that the Association opposes this type of an arrangement. They are concerned that if it spread up and down the River to other terminals, it could have a deleterious effect on traffic at the port of Baton Rouge. He also said that the master or the captain of the ship ought to be able to make his own decision as to who his towboat is going

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* Titled so in the original record on appeal.

to be. He ought to have some choice since he is responsible for the ship as to who is going to push him into the dock.

Petitioner makes various arguments: there is an invalid delegation of authority by the Port Commission to Ormet, the breach of duty by a public utility, the violation of the navigational servitude that ships have on using the Mississippi River, a violation of the Commerce Clause of the federal Constitution, and a violation of the enabling act which provides that there shall be no exclusive franchise to a carrier. Of course, part of the problem with 34:1223 is it doesn't define carrier and it doesn't state whether a tugboat utilized in this type of arrangement is a carrier. A tugboat that's normally on the Mississippi River as opposed to those in the Great Lakes, are usually pushing barges rather than towing. But in any regard, those boats certainly fit under anyone's definition of a carrier; but the statute doesn't define carrier and leaves it up to us to try to figure out what one is. I would suggest if the legislature did not want to authorize this type of an arrangement, then they could define carrier in the statute a little but better and perhaps we wouldn't be here, at least as far as that clause is concerned.

Let me state that even though it is termed as a non-exclusive arrangement, the effect of granting this contract to Bisso Towing or to anyone else is about as exclusive an arrangement as I can imagine. There is not anyone else being used. There are no other boats being utilized at the facility. Only if Bisso is not available or can't provide enough boats will they utilize anyone else. In fact, the evidence shows that since May 1, no one was aware of

any other tugboats being utilized at this facility other than Bisso.

I don't think that this violates any navigational servitude of the Mississippi River. I don't think it is an invalid delegation of authority by the Port Commission to Ormet or anyone else to run the terminal; however, the court has some question about what type of oversight authority the Port Commission is exercising over this facility. It would seem that Ormet, even though it might have a contract to run the port facility, if it entered into a lease such as this, that the port facility felt was beyond the public policy, that they ought to have some oversight and should be able to control the tariffs that are charged and how the port is run. I agree with Mr. Glusman, of course, that the port is not in the business of running the Burnside Terminal or any other terminal on a day-to-day basis, and that's why they lease it out to whomever. I don't think that either the Greater Baton Rouge Port Commission or Ormet is a public utility and, therefore, if they are not a public utility, they certainly don't breach any duty that a public utility would have.

I don't know that this arrangement is in the best interest of the Port of Baton Rouge. As Mr. Hayden says, if it were to spread, and I would suggest that if this arrangement is allowed, it very likely might spread, it could have a deleterious effect. Whether it does or not, remains to be seen.

I can't say that it violates the Commerce Clause. I think that a good argument can be made that a tugboat being utilized in this manner is a carrier. I think also that

a very good argument can be made that it is only assisting the carrier, and it is not a carrier. The court is not inclined to find that it violates the exclusive – or the non-exclusive clause of 34:1223, section E. For these reasons, the preliminary injunction is denied.

APPENDIX F

19th JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE, LOUISIANA

No. 419-211, Division H, Section 15

Crescent Towing & Salvage Co., Inc.
and E.N. Bisso & Son, Inc.,
Plaintiffs,

v.

Ormet Corporation and The
Greater Baton Rouge Port Commission,
Defendants.

JUDGMENT

The Plaintiffs' and Intervening Plaintiff's Petitions for Preliminary Injunction came on for hearing before this Court on October 6, 10, and 17, 1995, and the Court, after hearing the testimony of the witnesses, the evidence adduced at the hearing, and the legal briefs and arguments of counsel, having delivered its oral opinion at the conclusion of the hearing;

IT IS ORDERED, ADJUDGED AND DECREED that the Petition of plaintiffs, Crescent Towing & Salvage Co., Inc. and E.N. Bisso & Son, Inc., and Intervening Plaintiffs, River Parishes Co., Inc. for Preliminary Injunction against defendants, Ormet Corporation and The Board of Commissioners of the Port of Greater Baton Rouge, be, and the same is hereby, dismissed with prejudice, with plaintiffs bearing all costs.

Baton Rouge, Louisiana this 20th day of November, 1995.

/s/
District Judge Michael McDonald

APPENDIX G

19th JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE, LOUISIANA

No. 419-211, Division H, Section 15

Crescent Towing & Salvage Co., Inc.
and E.N. Bisso & Son, Inc.,
Plaintiffs,

v.

Ormet Corporation and
The Greater Baton Rouge Port Commission,
Defendants.

JUDGMENT

The plaintiffs' and intervening plaintiff's Petitions for Permanent Injunction were, pursuant to the stipulation of the parties, submitted to the Court on the record of the testimony, evidence, briefs, arguments and rulings of the hearings before this Court on October 6, 10, and 17, 1995, and the Court, having considered the stipulation of the parties for the entry of judgment on the Petitions for Permanent Injunction;

IT IS ORDERED, ADJUDGED AND DECREED that the Petition of plaintiffs, Crescent Towing & Salvage Co., Inc. and E.N. Bisso & Son, Inc., and Intervening Plaintiffs, River Parishes Co., Inc. for Permanent Injunction against defendants, Ormet Corporation and The Board of Commissioners of the Port of Greater Baton Rouge, be, and

the same is hereby, dismissed with prejudice, with plaintiffs bearing all costs.

Baton Rouge, Louisiana this 10th day of January, 1996.

/s/
District Judge Michael McDonald

APPENDIX H

Excerpts from Louisiana Revised Statutes,
Title 34 – Navigation & Shipping
Chapter 7 – Greater Baton Rouge Port Commission

La.R.S. 34:1223. Rights and powers of the board

A. The commission shall exercise the powers herein conferred upon it within the port area consisting of the parishes of East Baton Rouge, West Baton Rouge, Iberville, and Ascension as the boundaries and limits are presently fixed by law, except the industrial areas created in the parish of East Baton Rouge by the provisions of Section 1.08(b) of the Plan of Government for the parish of East Baton Rouge and the city of Baton Rouge.

* * *

C. The commission shall regulate the commerce and traffic within such port area in such manner as may, in its judgment, be for the best interest of the state. It shall have charge of, and administer public wharves, docks, sheds and landings and shall be empowered to construct or acquire and equip wharves and landings and other structures useful for the commerce of the port area and to provide mechanical facilities therefor; to erect sheds or other structures on such wharves and landings; to maintain proper depths of water at all such wharves and landings; to provide light, water, police protection and other services for its facilities as it may deem advisable; to construct or acquire, maintain and operate basins, locks, canals, warehouses and elevators; to charge for the use of all facilities administered by it and for all services rendered by it, such fees, rates, tariffs or other charges as it may establish; to establish harbor lines within the port

area by agreement with the corps of engineers; and to construct, own, operate and maintain terminal rail facilities and other common carrier rail facilities for the purpose of rendering rail transportation to and from the facilities to be erected, owned and operated by the commission in both intrastate and interstate commerce. Title to all property and improvements thereon operated by the commission shall vest in the State of Louisiana.

D. The commission may charge a reasonable fee to each vessel arriving in the port area in ballast or carrying cargo of any kind. It may also charge for each copy of any certificate issued by it or by any of its officers or employees for inspecting hatches, surveying cargo, or making other surveys or inspections of vessels in the port area, but shall furnish, without charge, to the master of each such vessel one copy of all surveys upon his vessel or cargo.

E. The commission shall have authority to make and enter into contracts, leases and other agreements with railroads, trucking companies, barge lines and with any and all companies interested in the transportation, storage and shipping of goods and other products, whether by rail, truck line, barge line, ocean going vessels or otherwise for the use of facilities administered by the commission or any part or portion thereof, for a period of time not exceeding forty years. No exclusive franchise, however, shall be granted to any carrier.

APPENDIX I

19th JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE, LOUISIANA

No. 419-211, Division H, Section 15

Crescent Towing & Salvage Co., Inc.
and E.N. Bisso & Son, Inc.,

v.

Ormet Corporation and
The Greater Baton Rouge Port Commission.

AMENDED PETITION

NOW INTO COURT, through undersigned counsel, come plaintiffs, E.N. Bisso & Son, Inc. ("ENB") and Crescent Towing & Salvage Co., Inc. ("Crescent"), and upon showing that no answer has been filed, amend their Petition for Preliminary & Permanent Injunction, filed August 2, 1995 (the "Original Petition"), as follows:

I.

Plaintiffs add the following Paragraphs and Counts to the Original Petition, following Paragraph 16 of the Original Petition, as follows:

* * *

COUNT III – VIOLATION OF FEDERAL COMMERCE CLAUSE

25.

Plaintiffs adopt by reference and reallege Paragraphs 1 through 16 of the Original Petition and Paragraphs 17 through 24 of this Amended Petition, as if repeated here in full.

26.

By virtue of Addendum No. 8 to the Terminal Lease and Ormet's May 1, 1995 tariff, Ormet and the Commission effectively regulate and proscribe the operation and navigation of competing harbor tugs, such as those operated by plaintiffs, upon the navigable waters of the Mississippi River.

27.

Such attempted regulation violates plaintiffs' right and freedom to navigate on the interstate waters of the Mississippi River, as well as the rights and freedoms afforded shipowners engaged in interstate commerce calling at Burnside Terminal to employ the harbor tug(s) of their choice. This interference violates the Commerce Clause of the U.S. Constitution, Art. I, § 8.

* * *

APPENDIX J

MARINE TERMINAL LEASE

Parties

THIS LEASE made the 1st day of August 1958, between the GREATER BATON ROUGE PORT COMMISION, an Executive Department of the State of Louisiana, hereinafter called Lessor, and OLIN MATHIESON CHEMICAL CORPORATION, a Virginia corporation, with its principal offices at 460 Park Avenue, New York, New York, hereinafter called Lessee;

* * *

Use of Property

2. The Terminal shall be a public marine terminal for loading, discharging, transferring, storing and handling commodities in bulk with such connecting rail and truck facilities as may be desirable in the opinion of lessee; provided that lessee may use and operate the Terminal primarily for the business requirements, including general cargo, of Lessee and subsidiaries and affiliates in which Lessee has at least fifty per cent. (50%) ownership, and the capacity of the Terminal, to the extent not required for such business, shall be available to others, without undue discrimination, for commodities in bulk of a nature suitable for the facilities of the Terminal in their normal operation. The Terminal may also be used for construction materials for the development of an industrial area adjacent to the Terminal.

* * *

Rules, Regulations and Charges

16. All vessels (including inland watercraft, tugs and towboats) which use the Terminal, and all cargoes loaded, discharged, handled, stored or transshipped at the Terminal, shall be exempt from the payment of all tariffs, rates and charges established by the Greater Baton Rouge Port Commission Tariff No. 1, any supplements and/or amendments thereto, and any successor tariffs. Lessee or its agent shall establish all rules, regulations, tariffs, rates and charges for use of the Terminal, which shall be subject to the approval of Lessor, and Lessor agrees to issue no rule, regulation or tariff in conflict therewith. Lessor further agrees that approval of rates and charges established by Lessee (except dockage charges provided for in Article 17) shall not be withheld if such rates and charges are competitive with other U. S. Gulf Ports. The dockage charges provided for in Article 17 shall always be subject to approval of Lessor, which approval shall not be unreasonably withheld.

* * *

APPENDIX K

ADDENDUM NO. 8 TO LEASE

This ADDENDUM NO. 8 is made this 1st day of January, 1992 to that certain Marine Terminal Lease dated August 1, 1958, as previously amended by Addendums No. 1 through 7 ("The Lease") between the Greater Baton Rouge Port Commission ("The Port") and Ormet Corporation ("Ormet"):

The Port and Ormet do hereby agree and amend The Lease by amending paragraph sixteen of the Lease in its entirety to now read as follows:

> "16. All vessels (Including inland watercraft, tugs and towboats) which use the Terminal, and all cargoes loaded, discharge, handled, stored or transhipped at the Terminal, shall be exempt from the payment of all tariffs, rates and charges established by the Greater Baton Rouge Port Commission Tariff No. 1, any supplements and/or amendments thereto, and any successor tariffs, except that the exemption contained herein shall not apply to the imposition of the Harbor Fee in items 130, 135 and 140 of Tariff No. 1 as in effect on January 1, 1992. Lessee or its agent shall establish all rules, regulations, tariffs, rates and charges for Lessor, and Lessor agrees to issue no rule, regulation or tariff in conflict therewith. Lessor further agrees that approval of rates and charges established by Lessee except decreases in dockage charges provided for in Article 17 shall not be withheld if such rates and charges are competitive with other U.S. Gulf Ports or in the opinion of Lessee are supported by sound business judgment. Any decrease in the dockage charges provided for in Article 17

shall always be subject to approval of Lessor, which approval shall not be unreasonably withheld."

* * *

APPENDIX L

[On Burnside Terminal Stationery]

Trial Exhibit 9

April 19, 1995

AYERS STEAMSHIP AGENCY
2 CANAL ST.
1803 INTL TRADE MT
NEW ORLEANS, LA 70130

Dear Madame/Sir:

As you are aware Burnside Terminal has been operating our facility for 36 years. Throughout this time we have enjoyed our business relationships, their successes, and the occasional trials and tribulations that go along with every endeavor. As a result we necessarily become older and hopefully wiser.

In an attempt to recognize the age of our facility and to operate it in a more safe and efficient manner, we have elected to discontinue allowing "anyone" to dock/undock vessels at Burnside Terminals dock or buoy system. Effective May 1, 1995 all vessels must arrange for "our" tugs when docking/undocking or any other activity requiring tug service.

NO OUTSIDE TUGS EFFECTIVE 05/01/95

This new procedure will lessen the damage caused to our facility, avoid unnecessary delays to our mutual customers, and provide cost savings to some. The cost of these services are:

JOB DESCRIPTION	TERMINAL	BUOYS
Dock/Undock Ships	$1,450/per tug	$1,450/per tug
Shifting between Berths	1,500/per tug	1,500/per tug
Stand-By (1st hour free)	320/per hour	320/per hour
Hold-Ins	420/per hour	420/per hour
Reporting Charges	750/per hour	750/per hour
Shifting at the Berth	420/per hour	420/per hour
Towage not covered above	420/per hour	420/per hour

Note: Stand-by, shifting at the berth and hold-in rates apply to each tug utilized.

We do not anticipate major problems in this procedure change; However, if you should have questions please feel free to contact any of us.

Sincerely,

/s/ Tom Lange
Thomas Lange
Terminal Manager

APPENDIX M

[On Navios Ship Agencies Inc. Stationery]
Trial Exhibit 11

July 6, 1995

VIA FAX

Mr. Thomas Lange
General Manager
Burnside Terminal Company
Post Office Box 25
Burnside, LA 70738

RE: Burnside Terminal – Tug Requirement

Dear Mr. Lange:

We had previously written to the Board of Baton Rouge objecting to the implementation of a privatized tug agreement at the Burnside Terminal, which you are operating. On behalf of our principals and our company, we protest this restrictiveness which you have imposed on those who utilize your facilities. Many of our principals have pre-established tug contracts, and a number of these tug contracts are predicated on the safety, experience and capabilities of the towing companies. We feel that the closure of this facility to our principals' choice of tug boat companies is in restraint of trade. It will be our recommendation to our principals to look to other discharge facilities along the river whereby their choice of tug boat services, for which they are responsible for payment, are available.

We do not feel that this action is in the best interest of the Port of Baton Rouge and we have copied Mr. Gary Pruitt

on this letter to that he can understand the position of our principals and Navios on your actions.

Yours very truly,

/s/ George E. Duffy
George E. Duffy
President

GED/pst

cc: Mr. Gary Pruitt, Executive Director,
Greater Baton Rouge Port Commission

APPENDIX N

19th JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE, LOUISIANA

No. 419-211, Division H, Section 15

Crescent Towing & Salvage Co., Inc.
and E.N. Bisso & Son, Inc.,
Plaintiffs,

v.

Ormet Corporation and The
Greater Baton Rouge Port Commission,
Defendants.

Excerpts from the Record on Appeal

Thomas Lange, called as a witness on behalf of the plaintiffs, after having been first duly sworn, testified as follows:

[R. 181] DIRECT EXAMINATION

By Mr. Peck [Counsel for plaintiff-petitioners]:

Q. Please state your name for the record.

A. Thomas Lange.

Q. By whom are you employed?

A. Ormet Corporation.

Q. What is your position at Ormet?

A. Operations manager.

Q. How long have you been operations manager?

A. Approximately fifteen months.

Q. And where do you work – what location for Ormet do you work at?

A. The Burnside Terminal.

Q. And what do you do at the Burnside Terminal? What does the operations manager do at the Burnside Terminal?

A. He oversees the daily activities – all the operations.

Q. Okay. Are you in charge of the daily activities at the terminal?

A. Yes.

Q. And this terminal is located where?

A. In Burnside, Louisiana.

Q. On the Mississippi River?

A. Right.

Q. And it is called the Burnside Terminal?

A. Right.

Q. Now, adjacent to the terminal is there an alumina plant?

A. Yes, there is.

Q. And that alumina plant is owned by Ormet?

[R. 182]

A. That's correct.

Q. What is alumina?

A. It's a white powdery bulk material.

Q. What materials are used to produce alumina?

A. Bauxite and caustic soda.

Q. Okay. And where does the bauxite come from?

A. Generally South America.

Q. Okay. It's shipped in to the terminal on oceangoing ships?

A. That's correct.

* * *

Q. Where does that [caustic soda] come from?

A. Different chemical plants in the United States.

Q. How is that brought to the facility?

A. By barge.

Q. And that material is off-loaded at the terminal also?

A. That's correct.

* * *

Q. Is the Burnside Terminal a public terminal?

A. Yes, it is.

* * *

[R. 188]

Q. Okay. Now, isn't it true that from – from May 1, 1995 or from the date of that letter no ship can dock at the

Burnside Terminal unless "our tugs/your tugs" are used to do the docking; isn't that correct?

A. If a vessel needs tugs, it has to use our tugs.

Q. And isn't it true you – if a ship came up with Crescent Tugs or E. N. Bisso Tugs and wanted to dock, you would not let that ship dock at the Burnside Terminal; isn't that correct?

A. If the ship was not using our tug, it would not be allowed to dock.

* * *

Supreme Court, U.S.
FILED
JAN 19 1999
CLERK

No. 98-941

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CRESCENT TOWING & SALVAGE COMPANY, INC.
and E. N. BISSO & SON, INC.,

Petitioners,

vs.

ORMET CORPORATION and THE GREATER
BATON ROUGE PORT COMMISSION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

BRIEF IN OPPOSITION FOR RESPONDENT ORMET CORPORATION, NOW KNOWN AS ORMET PRIMARY ALUMINUM CORPORATION

ERNEST L. EDWARDS, JR.
RICHARD B. FOSTER
Counsel of Record
LEMLE & KELLEHER, L.L.P.
Attorneys for Respondent
Ormet Corporation, now known as Ormet
Primary Aluminum Corporation
601 Poydras Street, Suite 2100
New Orleans, Louisiana 70130-6097
(504) 586-1241

150827

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

37pp

QUESTION PRESENTED

The Greater Baton Rouge Port Commission ("Port Commission") owns a marine terminal facility on the Mississippi River which it has leased to respondent, Ormet Primary Aluminum Corporation ("Ormet") since 1973. The facility is equipped to transfer cargo between ships, barges and railcars. Harbor tugs are ordinarily used to assist ships docking at the terminal. In 1995, Ormet began requiring ships to use its dedicated tugs. Ormet subcontracted with a competitor of the petitioners to provide the tugs. Ormet does not use petitioners' tugs. In response to petitioners' complaints, the Port Commission concluded that these arrangements did not violate Ormet's lease from the Port Commission, and it took no further action. Do the actions of Ormet or the Port Commission violate the Commerce Clause?

LIST OF PARTIES

Petitioners, Crescent Towing & Salvage Company, Inc. and E. N. Bisso & Son, Inc.

Stewart F. Peck, Esq.
Scott R. Wheaton, Jr., Esq.
David B. Sharpe, Esq.
Lugenbuhl, Burke, Wheaton, Peck, Rankin
& Hubbard
601 Poydras Street, Suite 2775
New Orleans, LA 70130-6027
Telephone: (504) 568-1990

Respondent, The Greater Baton Rouge Port Commission

Stephen W. Glusman, Esq.
Glusman, Moore, Arbour, Broyles & Glusman
701 North Street
Baton Rouge, LA 70802
Telephone: (504) 387-5551

Respondent, Ormet Primary Aluminum Corporation

Ernest L. Edwards, Jr., Esq.
Richard B. Foster, Esq.
Lemle & Kelleher, L.L.P.
601 Poydras Street, Suite 2100
New Orleans, LA 70130-6097
Telephone: (504) 586-1241

The named respondent, Ormet Corporation, was renamed Ormet Primary Aluminum Corporation prior to suit and has appeared under the latter name throughout the proceedings. Its parent company, Oralco, Incorporated, was also renamed and is now known as Ormet Corporation. There are no nonwholly owned subsidiaries of either corporation.

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3. There is no open issue of national importance in this case because Congress has affirmatively acted to impose a regulatory structure on the operations of marine terminals.	9

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Appendix A — Opinion of Chief Administrative Law Judge Norman D. Kline dated April 30, 1998 in the matter of *River Parishes Company, Inc. v. Ormet Primary Aluminum Corporation*, F.M.C. Docket No. 96-06 ..... 1a

STATEMENT OF THE CASE

The material facts of this case are straightforward. The Board of Commissioners of the Port of Baton Rouge ("Port Commission") owns a marine terminal on the Mississippi River at Burnside, Louisiana. Ormet Corporation ("Ormet") owns an alumina plant next door to the terminal. R. 181. (References to page numbers preceded by "R." are references to the record.) The terminal was built to serve the raw material needs of the alumina plant. R. 340, 356-357, 367. Pursuant to its statutory authority, the Port Commission has leased the terminal to Ormet for its own use as well as to operate as a public terminal to the extent that the terminal's capacity is not required to bring materials to and from Ormet's adjacent Alumina Plant. (Exhibit P-1, Addendum 4, pp. 2-3). The lease further provides that Ormet as lessee shall establish all rules, regulations, tariffs and charges for the terminal, which the Port agrees will be approved if they are competitive or supported by Ormet's sound business judgment. (Exhibit P-2, Addendum No. 8, p. 1).

When not being used to handle raw materials for Ormet's plant, the terminal serves shippers of bulk cargos who have a need for a terminal to handle their goods to and from ships, barges, railcars, etc. R. 210, 351-352. The terminal includes a dock and a nearby mooring buoy system for ships bringing cargo to and from the terminal. R. 206-07, 351, 356. It is one of over 150 terminals and ship loading facilities on the river from Baton Rouge to below New Orleans. Tugs are used at all of these locations.

In connection with ships, the terminal provides various services including cargo stevedoring, line handling, shifting at the dock, derrick barges, barge fleeting and shifting, and fresh water. Ormet charges for all of these services pursuant to rates established in its tariff or in individual letter agreements. R. 208-09. Most of these charges are at flat rates applicable equally to all users. Stevedoring rates are negotiated and vary from cargo to cargo.

R. 223-25. None of the rates and charges for these services has ever been regulated by the Port Commission, nor has the Port Commission ever regulated rates and charges of any of the numerous facilities it leases to private concerns. R. 335, 358.

On May 1, 1995, the terminal began providing tug service for the ships docking at the facility. As of that date, ships docking at the terminal have been required to use tugs provided by the terminal to assist their docking maneuvers. Flat rates were established by Ormet for the tug service which are charged equally to all ships using the tugs, and which are competitive with the prevailing "discounted" rates charged by all tug companies in the area. R. 384, Exhibits P-5, P-6 and P-7. For example, Ormet's charge for one tug for one ship docking maneuver, either in or out, is $1,450.00 no matter how large or small the ship may be. The standard "tariff" charge for the same service established by all four tug companies for a ship of 4,000 gross register tons (grt) was $1,750.00 in 1995. R. 380, 383, 397, Exhibits P-5, P-6 and P-7. In addition, per their tariffs, each tug company (but not Ormet) charged an additional $13.00 as a "tonnage charge" based on the weight of the ship over 4,000 grt. R. 381, 383, Exhibits P-5, P-6 and P-7. For each 1,000 gross register tons over 4,000 grt, the ship is charged an extra $13.00 under the tug company tariffs. R. 382.

Thus, the standard tariff rate by the tug companies for a ship of 10,000 grt was $1,828.00 per tug. This was computed as $1,750.00 for the basic 4,000 grt, plus $78.00 for the 6,000 extra grt (6 x $13.00 = $78.00). A 20,000 grt ship would be 16,000 grt over the basic rate and would be charged an extra $208.00 (16 x. $13.00) for a total of $1,958.00. The total rate for a 30,000 grt ship was $2,088.00. Exhibits P-5, P-6 and P-7.

Generally, the tug companies discount these standard tariff rates by an average of about 25%. R. 384. Applying a 25% discount to the standard tug company rates results in an average discounted charge per tug as shown in the following table:

Ship Size	Tug Company Tariff Rate	Tug Company Discounted Rate	Ormet Rate
10,000 grt	$1,828	$1,371	$1,450
20,000 grt	1,958	1,468	1,450
30,000 grt	2,088	1,566	1,450

Charles Andrews, the president of one of the petitioners, Crescent Towing & Salvage Co., Inc. ("Crescent"), in fact admitted at trial that Ormet's tug rates were not higher than his own company's discounted rates. R. 433. In addition, Channing Hayden, the president of the New Orleans Steamship Association, a group of shipowners and agents, testified that tug companies had been charging ships $1,400 to $1,500 per tug at the terminal in comparison with Ormet's charge of $1,450. R. 324.[1] While the petitioners continue to claim that Ormet's tug charges are higher than their own, it should be noted that this directly contradicts the testimony of their own witnesses, Messrs. Andrews and Hayden. (See above.)

Since Ormet's tug service was instituted, ships have no longer been permitted to choose any tug company, as they had done in the past, but are required to use the tug service provided by the terminal. R. 188. The terminal began requiring use of its tugs for several reasons. Terminal management sought to improve the terminal's efficiency and safety and to make a profit on the service as well. Delays had been encountered in the past because of tug unavailability, and management also believed that tugs could contribute to avoiding damage to the dock. Management's prior experience at a competing terminal, IMT in Myrtle Grove, had shown that similar delays and damage were avoided when that terminal required ships to use a single tug company provided by the terminal rather than allowing them to hire anyone they wished. R. 213-14, 219-21.

1. Since this case went to trial in 1995, the tug companies have raised their prices several times. Ormet's charge has remained the same.

In order to provide the required tug service, Ormet sub-contracted with Bisso Towboat Company ("Bisso Towboat"), which one of the four harbor tug companies which operate on the river. Ormet first obtained bids for the tug service from Bisso Towboat and from a competing tug company, E. N. Bisso & Son, Inc. ("E. N. Bisso") (also a petitioner in this action), but elected to go with Bisso Towboat. R. 214. Ormet chose Bisso Towboat on the basis that it offered the lowest price and was willing to provide tugs to Ormet on a non-exclusive contract basis. R. 219. Because the contract provides Bisso Towboat with steady business and economies of scale, it can price its services lower, and Ormet can pass these benefits on to the ships in the form of lower rates.

Pursuant to the contract, Bisso provides five to six tugs at a permanent base it maintains a few miles from the terminal. These pre-positioned tugs, which have permanent crews, provide substantially all of the docking assistance required at the terminal. As a result, the crews are there almost every day, and they become very familiar with local river conditions at the dock to better assist the pilots and captains of the ships. R. 376-77. In addition, the fact that Bisso Towboat's tugs are permanently stationed nearby means that tugs are readily available at all times. If they are late, Bisso Towboat is required to pay Ormet $1,800.00 per *hour* for holding up terminal operations. R. 377.

Ormet's contract with Bisso Towboat provides that Bisso Towboat will render tug services at stipulated rates at Ormet's request. Despite appellants' statements to the contrary, the contract is not, in fact, an "exclusive" franchise—Ormet is not required to use only Bisso Towboat, and the contract specifically provides that Ormet can hire Bisso Towboat, Crescent, E. N. Bisso, or anyone else, at Ormet's option. R. 219-220, 385-86; Exhibit P-4, clause 12, pp. 7-8. In order to obtain the benefits that can be expected from a single company providing the same tugs repeatedly, Ormet has chosen to use Bisso Towboat on all ships that have docked at the terminal. However, Ormet has not extended

Bisso Towboat any rights to be the sole tug company. R. 220; Exhibit P-4, clause 12.

The service physically rendered by harbor tugs at the terminal is as follows. As a ship arrives in the vicinity of the terminal, the tugs (which have previously been advised of the ship's ETA) come alongside the ship and make fast to it as directed by the ship's pilot. The ship, which is under the command of its captain and assisted by a river pilot, then proceeds to the dock. As the ship approaches the dock, the tugs provide extra power and maneuverability to the ship as required under the direction of the ship pilot. The tugs continue to assist under the pilot's orders as the ship comes into contact with the dock, and the terminal line handlers secure the ship's mooring lines. After the ship is fully secured, the tugs are released by the ship. The same process takes place in reverse when the ship departs. R. 264-65. These are dangerous procedures because the full weight of the ship must land against the dock and hold on in the river current.

Since May 1, 1995, the aforementioned tug service has been rendered by Bisso Towboat at the terminal without any delays due to unavailability of tugs, and without any docking incidents. No one has complained about either the adequacy of Ormet's tug services or their price. R. 221-22, 378. However, the petitioners in this case, the three harbor tug companies that did not obtain Ormet's business, all complained about the new service. All three objected to the Port Commission and to Ormet, as did several steamship agents. Upon receipt of these objections, the Port Commission inquired with Ormet about its tug service, raised a number of legal issues, and requested information. (Exhibit P-18). Ormet's counsel replied to the legal issues a few days later, (Exhibit P-19) and then the Port Commission's counsel made further written inquiry. (Exhibit P-20). In response to this inquiry, Ormet furnished a lengthy explanation of the details and objectives of the tug service. (Exhibit P-21).

On June 15, 1995, the matter of the objections was brought up at a meeting of the Executive Committee of the Port Commission. At this meeting, representatives of all three aggrieved tug companies presented their opinions and arguments to the Committee, as did a representative of the New Orleans Steamship Association. Ormet's counsel was also heard, and the committee consulted with the Port Commission's counsel concerning the legal issues involved. After considering all of these matters, the committee concluded that Ormet was not in breach of its lease of the terminal from the Port Commission, and they voted to table further consideration of the objections. R. 337, 347, 353-55.[2]

The petitioners thereafter commenced this suit, demanding that the district court order the Port Commission to reverse its position and vote to declare the Ormet tug service illegal and against public policy. They further requested that the court order that Ormet be prohibited from exercising its existing contract with Bisso Towboat. The district court rejected their arguments and denied their requests for preliminary and permanent injunctive relief.[3] Petitioners have unsuccessfully appealed the denial of their requests for both a preliminary and a permanent injunction to the Louisiana First Circuit Court of Appeals and the Louisiana Supreme Court. The Louisiana Supreme Court granted review solely in regard to petitioners' Commerce Clause challenge. On the merits the court below determined that the Port Commission acted as a market participant and that the actions of Ormet and the Port Commission were neither state regulation nor state action. Accordingly, the Commerce Clause was not violated.

---

2. Thus, petitioners' statement that the Port Commission did not review the Bisso Towboat contract is simply incorrect.

3. By stipulation of the parties, the district court ruled on the issue of petitioners' entitlement to permanent injunctive relief on the basis of the transcript and other evidence adduced at the hearing on petitioners' request for a preliminary injunction. R. 157.

SUMMARY OF ARGUMENT

A. The Louisiana Supreme Court properly applied the relevant decisions of this Honorable Court and there are no unsettled issues of law for review.

The Louisiana Supreme Court reviewed the case in respect to the Commerce Clause only. In doing so it followed the analysis of this Court's relevant decisions. The principles it applied included the proposition that the Commerce Clause restricts state regulation of interstate commerce but leaves private actors free of restraint. The court noted that the clause *per se* prohibits state regulation directly discriminating against local interests and that indirect discrimination is prohibited if it imposes an undue burden on commerce. The court also noted, without applying, this Court's analysis for determining the existence of an undue burden. Instead the Court examined whether the state was a "market participant" not acting in its sovereign capacity and should be treated as a private actor under Commerce Clause analysis. Properly applying this Court's decisions, the court below determined that the Port Commission was a market participant and that "state action" was not involved in the actions of either Ormet or the Port Commission. The law of this Court is clear on these issues and was properly applied to the facts by the court below. There is no need for further review.

B. Petitioners reasons for granting a writ are without merit.

1. *The decision of the Louisiana Supreme Court does not conflict with United States Court of Appeals decisions regarding "exclusive franchises".*

Petitioners cited certain cases holding that airports could not grant exclusive rights to certain taxi companies to pick up all passengers at the airports and exclude other taxi companies from

picking up those passengers who had already paid for their airport transfer as part of a package tour. The cases are inapposite. The true airport analogy would compare Ormet to an airport which required arriving airliners to use the airport's tow trucks to come to the gates and prohibited the airliners from supplying their own tow trucks. In addition, the cited cases all involve restrictions directly imposed by the state. In the present case, the state Port Commission has neither compelled nor encouraged Ormet's tug service. It has simply refused to interfere. This does not constitute state regulation.

2. *There is no conflict in the decisions of the Louisiana Supreme Court and the United States Courts of Appeals in the application of the "state action" and "market participant" doctrines in Commerce Clause cases.*

Analysis of the cases cited by petitioners reveals that the cases are very consistent in their characterization of state lessors as "market participants" in regard to leasing state property for commercial purposes. The variations in the cases result from the varying facts necessarily addressed. The Port Commission in this case simply leased its terminal to Ormet and refused to intervene in the tug market. This is market participation, not state regulation.

The court below also analyzed the case under the "state action" doctrine usually found in this Court's decisions concerning fundamental individual rights. The court below correctly concluded that no state action was present under these tests. Respondent submits, however, that such "state action" analysis has never been used in Commerce Clause cases. This is because if state "market participation" is found, the state's actions are permitted by the Commerce Clause, not prohibited. Thus, "state action" analysis makes no difference.

3. *There is no open issue of national importance in this case because Congress has affirmatively acted to impose a regulatory structure on the operations of marine terminals.*

Because marine terminals are important, Congress has taken affirmative action to regulate them under its Commerce Clause powers: the Shipping Act of 1984 and the Federal Maritime Commission. One of the three aggrieved tug companies has filed a petition with the FMC under the Shipping Act claiming Ormet's tug service is unreasonable and prejudicial. An FMC trial was conducted by an ALJ last year in which two full years of Ormet's tug service was examined. Unlike the trial court in this case, the FMC analyzed the actual effect of Ormet's operations. It was not restricted to the parties' prediction of the future as was the trial judge in the injunction hearings in this proceeding. The ALJ found that Ormet's operations were reasonable and economical. A full FMC opinion is due February 3, 1999.

The FMC proceeding thus far indicates that the expert agency charged with regulating marine terminals finds no fault with Ormet. This Court need not intervene where there is established regulatory machinery created by Congress and that machinery is in process of reviewing substantially the activities presented in this case.

4. *Ormet's tug service arrangements do not discriminate against interstate and foreign commerce nor do they burden it.*

There is no discrimination in favor of local interests against out-of-state interests. All parties involved are engaged in interstate and foreign commerce. Petitioners are merely unhappy that another company outbid them for Ormet's work, but the Commerce Clause does not protect individual parties from competition or loss of business. Ormet's tug service does not burden interstate commerce. It is a permissible fee-for-service arrangement and has in fact

provided cheaper tug rates to ships coming to the terminal. This is a benefit, not a burden.

REASONS FOR DENYING THE WRIT

I. THE LOUISIANA SUPREME COURT PROPERLY APPLIED THE RELEVANT DECISIONS OF THIS HONORABLE COURT AND THERE ARE NO UNSETTLED ISSUES OF LAW FOR REVIEW.

The Louisiana Supreme Court reviewed this matter on writ of certiorari solely as to the Commerce Clause issue. In this regard the decision is a model of clarity in the application of this Court's relevant precedents.

The court below began its review by noting that the Commerce Clause on its face empowers Congress "To regulate Commerce with foreign Nations and among the several States . . ." U.S. Const. Art. I, § 8.[4] From the outset, however, the Court also recognized that this grant of power to Congress also limited the power of the states, citing a seminal decision of this Court in a Louisiana case, *Cooley v. Board of Wardens*, 12 How. 299, 18 L. Ed. 996 (1852).

The court below than turned to this Court's decisions setting out the framework for the analysis of state activities under the restrictions of the Commerce Clause. The court below noted the bifurcation of the analysis between state regulations directly discriminating against interstate or foreign trade in favor of local interests, which are virtually *per se* invalid, *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S. Ct. 2531, 57 L. Ed. 2d 475

4. The commerce involved in this case is at the intersection of foreign trade (by ships) and interstate commerce (by barges and rail cars). The tugs serve the foreign trade component but the legal analysis is the same for either foreign or interstate trade. For consistency with the majority of the cases which involve interstate commerce, this brief will refer to the commerce in question as "interstate".

(1978), and state regulations indirectly discriminating against interstate or foreign trade, which are invalid only if they impose an undue burden on such trade. *Hughes v. Oklahoma*, 441 U.S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979). The Court also noted this Court's criteria for determining what constitutes an "undue" burden as established in *Hughes*, 441 U.S. at 336, and *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970), which include:

1) whether the challenged action regulates evenhandedly with only incidental effects on interstate commerce;

2) whether the challenged action serves a legitimate local purpose; and, if so,

3) whether there are less burdensome alternatives.

Lastly, the Court pointed out that the Commerce Clause does not apply to burdens imposed by private actors. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 60 S. Ct. 869, 84 L. Ed. 1108 (1940). The court then referred to the "market participant" rule crafted by this Court which distinguishes between a state's activities as a regulator subject to the strictures of the Commerce Clause, and its proprietary activities as a market participant which are free of restraint as if it were a private party. *Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S. Ct. 2271, 65 L. Ed. 2d 244 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976). On the other hand, the Court also recognized the principle that a private party's activities could amount to state action if there was a "close nexus" between the private party's action and the state. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 107 S. Ct. 2971, 97 L. Ed. 2d 427 (1987).

The foregoing decisions of this Court and the principles they embody were the framework of the decision of the Court below, against which it tested the petitioners' claims. The principles relied

upon in each of these decisions are as viable today as when the decisions were rendered and, taken together, provided a complete basis for analysis of the challenged actions.

Using these principles, the court below considered each of the respondent's activities: the Port Commission's lease to Ormet, Ormet's decision to provide exclusive tug services, and the Port Commission's refusal to attempt to prohibit Ormet's actions. In applying the law to the facts, the court below found that the Port Commission was a market participant in competition with other terminals in leasing its terminal to Ormet. It further found that the Port Commission's mere inaction in regard to Ormet's decisions did not constitute state action in the absence of any compulsion or significant encouragement by the Port Commission.

There is abundant evidence to support the facts underlying the Louisiana Supreme Court's decision. The court below having applied the relevant decisions of this court to the facts found, there is no reason to further review either the facts or the law, and the writ ought to be denied. *Roemer, III v. Board of Public Works of Maryland*, 426 U.S. 736, 758, 96 S. Ct. 2337, 2350, 49 L. Ed. 2d 179, 194-95 (1976); Rules of the United States Supreme Court, Rule 10(c).

II. PETITIONERS REASONS FOR GRANTING A WRIT ARE WITHOUT MERIT.

A. The decision of the Louisiana Supreme Court does not conflict with United States Court of Appeals decisions regarding "exclusive franchises".

Petitioners have cited this Court to a number of lower court cases involving taxicab franchises at airports. In these cases, the common thread is that the local airport authority granted an exclusive franchise to a single taxi or limousine service to pick up all arriving passengers. In each case, a competing operator

complained that this arrangement prevented it from providing service to arriving passengers who had already paid for the service as part of their tour packages. The courts held that while the airports could grant a single taxi or limousine operator or group of operators an exclusive franchise to "solicit" arriving passengers, the Commerce Clause prevented them from prohibiting other operators from providing services to those passengers who had already made their arrangements through a prepaid package tour. *Charter Limousine, Inc. v. Dade County Bd. Of County Commissioners*, 678 F.2d 586, 589 (5th Cir. 1982); *Southerland v. St. Croix Taxicab Ass'n*, 315 F.2d 364 (3rd Cir. 1963).

These cases are readily distinguishable from the present situation, and it is misleading to offer them as analogies. The true analogy between an airport and Ormet's terminal would compare the *airliners* at the airport with the ships calling at Ormet's terminal. The airliners bring in their passengers and baggage just as ships bring in their cargos. The airliners "dock" at the airport gates and often require tow trucks to assist them, just as do the ships at Ormet's terminal. If in the cited cases the airport authorities had required the airlines to use the airport's tow trucks rather than letting the airlines hire or provide their own, would the analysis employed and the outcome of those cases be different? It is submitted that it would, particularly if the airliners, like the ships at Ormet, necessarily had to land their full weight against the airport building, metal-to-metal, each time they arrived.

In such a case, the same safety concerns that motivated Ormet to control the tugs at its dock would impel airports to control the docking of arriving airliners. No Commerce Clause issue would arise because it would be a simple fee-for-service arrangement similar to Ormet. *See New Orleans S.S. Assn. v. Plaquemine Port, Harbor & Terminal District*, 690 F. Supp. 1515, 1521-1524 (E.D. La. 1988), *aff'd*, 874 F.2d 1018, *amended*, 891 F.2d 1153, *cert. den.*, 495 U.S. 932, 110 S. Ct. 2172, 109 L. Ed. 2d 502 (1990), and cases cited therein.

An equally great distinction between the taxicab cases and the present situation is the fact that in each of the taxicab cases the actions complained of are the direct acts and/or prohibitions of a state governmental entity. In the present case, the Port Commission has not acted at all except to passively acquiesce in Ormet's decision by refraining from any attempt to prohibit it. Not even the petitioners have argued that Ormet's exclusive tug services were in any way compelled or encouraged by the Port Commission, that the Port Commission derives any revenues or benefits from the new arrangement, or that the Port Commission participates in the exclusive tug services.

Thus, as discussed in more detail in the next section, Ormet's tug service can be fairly characterized as purely private and non-governmental. Although petitioners contend that this makes no difference, it in fact makes all the difference. The petitioners' contention that the Port Commission cannot do indirectly through Ormet what it cannot do directly simply falls flat when there is no evidence that the Port Commission is "doing" anything, and Ormet's tug services are entirely a matter of private commerce neither compelled, encouraged, nor participated in by the Port Commission. Such private action is properly outside the restraints of the Commerce Clause in the absence of any action by Congress to exercise its commerce powers.

B. There is no conflict in the decisions of the Louisiana Supreme Court and the United States Courts of Appeals in the application of the "state action" and "market participant" doctrines in Commerce Clause cases.

Petitioners claim that there is a conflict among the circuits regarding application of the "market participant" doctrine to cases involving states as lessors. This so-called conflict amounts to a single Fifth Circuit case which is contrasted with a single Eighth Circuit case. The Fifth Circuit case, *Smith v. Dept. of Agriculture*

of the State of Georgia, 630 F.2d 1081 (5th Cir. 1980), *cert. den'd*, 452 U.S. 910, 101 S. Ct. 3040, 69 L. Ed. 2d 412 (1981), involved a state-owned farmers market which became so crowded with tenants that the state boldly and expressly excluded its out-of-state tenants in favor of local farmers. This unapologetic assault by the state directly against interstate commerce prompted the Fifth Circuit, in a plurality opinion, to find that the practice was barred by the Commerce Clause. In doing so, the Fifth Circuit analyzed the state's market participant defense in terms of the relevant market—the leasing of booths or the sale of produce. Three opinions resulted. The lead opinion by District Judge Lynne found that the state's role was hybrid—it owned the market but did not participate in buying and selling. He concluded that the state's relevant role was as a market regulator deciding who was permitted to buy and sell. *Id.* at 1083. Judge Gee filed a concurring opinion in what he stated was a "close case", *id.* at 1085, finding that the relevant market was in produce, not sale booths, and that the state was regulating who could sell produce. *Id.* at 1086. (Both Judges Lynne and Gee seem to have been mainly influenced by the fact that the case involved an actual "market".) Dissenting, Judge Randall reached a contrary conclusion and decided that the relevant activity was the leasing of space and that the state was no different than a commercial property owner unrestricted by the Commerce Clause. *Id.* at 1088.

This "close" case, with three opinions from three judges, is contrasted by petitioners with the recent Eighth Circuit case of *Four T's, Inc. v. Little Rock Mun. Airport Commission*, 108 F.3d 909 (8th Cir. 1997), which involved the method of calculation of fees charged to car rental companies for space at a municipal airport. The Eighth Circuit considered the Fifth Circuit's 1981 decision in *Smith*, and found Judge Randall's dissent to be the more persuasive argument, because in the case before the Eighth Circuit the airport's role was more aptly characterized as "a participant in the market for marketplace space". *Id.* at 913. In

other words, in the Eighth Circuit's case, the dispute was more directly concerned with the airport's commercial leasing activities than was the dispute decided by the Fifth Circuit, and the Eighth Circuit addressed the airport's status as a marketplace participant in the context of the commercial real estate market, not the car rental market. The results of the two cases are different simply because facts presented were so different.

The same may be said for the lower court decisions cited by petitioners. For example in *Airline Car Rental, Inc. v. Shreveport Airport Authority*, 667 F. Supp. 303 (W.D. La. 1987), the court addressed an airport-imposed fee on *non-tenant* car rental agencies. Although cited by petitioners as a conflict with the Eighth Circuit in *Four T's, Inc.*, this is entirely misleading. *Airline Car Rental* involves fees and other requirements imposed by the airport on non-tenant car rental companies who occupied no space at the airport. Like the Eighth Circuit, the court actually concluded that the airport had not itself entered the car rental market and thus it concluded that the airport's role in imposing the fees on the non-tenants was that of a market regulator constrained by the Commerce Clause. Also like the Eighth Circuit, the court noted that in regard to the rental car companies that were in fact the airport's tenants, the airport acted in a proprietary capacity free of Commerce Clause restraint. To the same effect is the holding in *Transport Limousine of Long Island, Inc. v. Port Authority of New York and New Jersey*, 571 F. Supp. 576 (E.D. N.Y. 1983) in which airport lessor was held to be a market participant.

Equally misleading is petitioners' characterization of *Air Transport v. City and County of San Francisco*, 992 F. Supp. 1149 (N.D. Cal. 1998), as an airport lessor/market regulator case. In that case, the court considered a city's requirement that all contracts of the city-owned airport include a requirement that the contractor refrain from discriminating against their employees on the basis of sexual orientation *anywhere in the United States*. In answer to

the city's "marketplace participant" defense, the court found that "There is no question that the City is acting as a market place participant . . ." and "when the City enters into contracts . . . it is directly participating in the marketplace by purchasing services or leasing property." *Id.* at 1163. This is precisely contrary to petitioners' description of the case.

The question actually presented in the case was whether the city was improperly reaching "beyond the sphere of economic activity in which it is participating in an attempt to regulate commerce beyond its borders." *Id.* at 1163. The city was obviously doing so, contrary to the dictates of *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986), and the ordinance was struck down.

Here again, however, the treatment of the airport as a lessor and market participant is consistent with the other cases on the subject. It differs in result for no reason other than the city's extra-territorial attempt to impose its will nationwide, a factor absent from the other cases and from this case.

Accordingly, the split of authority claimed by the petitioners is largely illusory. The few courts who have addressed the "market participant" doctrine have all employed the proper precedents and analysis in the decisions. The differences in result are readily attributable to the wide range of facts presented and the fact-intensive nature of the inquiry, but there is a high degree of consistency in the treatment of public bodies as market participants in regard to their leasing activities. The decision of the Louisiana Supreme Court in this case is therefore entirely consistent in its treatment of the Port Commission as a market participant in regard to its lease with Ormet.

For petitioners to contend that the Port Commission should be treated as a market regulator of tug services merely by virtue of its terminal lease to Ormet (a lease which does not even mention

tugs) is totally without legal or factual support. Attempting to characterize Ormet's tug services to the state as "indirect" state regulation of the tug service market falling outside the market participant exception fails for lack of a logical basis in fact. The petitioners cannot on the one hand complain of the Port Commission's refusal to involve itself in Ormet's private tug contracts (which the state could itself enter into as a market participant free of Commerce Clause restraint) as a kind of state regulation of the tug market, and at the same time claim that the same refusal somehow constitutes "indirect state *participation* in the market" that is equivalent to state regulation unprotected by the market participant exception. It is pulling oneself up by the bootstraps to argue that "indirect" state participation in the tug market, merely by leasing a terminal to a company that provides tug services and then refusing to intervene in the tug services, constitutes state regulation of the tug service market. The argument fails because such state activities, when examined directly, are simply not regulation at all. The Louisiana Supreme Court was right when it found the Port Commission to be a market participant, and there is no split of authority requiring this Court's intervention.

Petitioners next attempt to employ the case of *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961), to impute Ormet's tug services to the Port Commission as "state action." In *Burton*, of course, the discriminatory practices of a restaurant located in a state-owned and operated parking garage were found to constitute "state action" in the context of a Fourteenth Amendment equal-protection claim. The restaurant's operation was found to be so interdependent and intertwined with the state's parking operation as to make the state a "joint participant" in the restaurant's discriminatory activities such that the latter were effectively state actions proscribed by the equal protection clause.

Although it was not noted by the Louisiana Supreme Court, *Burton*'s holding is of little use in a market participant/state

regulatory context. This is because in *Burton*, the discriminatory actions of the private party were constitutionally prohibited if performed by the state. The characterization of these actions as "state" actions and not "private" actions therefore made a difference. In the context of state market participation versus state regulation under Commerce Clause precedents, the existence of "state action" makes no difference at all. The real question is whether the "state action" is as a market participant or as a market regulator. If the challenged conduct constitutes "market participation" it is not proscribed by the Commerce Clause whether performed by a private party or the state itself.

The point is that even if the Port Commission chose to operate the terminal itself and to provide tug services precisely as Ormet is doing, it would not be a market regulator. Rather, it would be a market participant entitled to the same rights as a private party to determine which tug company it wished to deal with and to fix the terms on which it would provide services to the ships using the terminal. Thus, the imputation of the term "state action" to Ormet's tug services is pointless in the present case because the Port Commission, *i.e.*, the state itself, could permissibly engage in the same activities as a market participant.

The Louisiana Supreme Court did, however, address itself to the "state action" issue and fully discussed *Burton* as well as the more recent case of *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 107 S. Ct. 2971, 97 L. Ed. 2d 427 (1987). The court below noted *Burton*'s instruction that its decision was not to be applied to all state leases, commenting that state action decisions were to be made *ad hoc* by "weighing circumstances." *Burton*, 365 U.S. at 722. The court also noted that this case's only similarity to *Burton* was the fact that both involved a private party leasing a state facility. In point of fact, few, if any, of the factors considered in *Burton* are present here. In *Burton*, this Court described the "peculiar relationship"

of the restaurant to the state's parking facility which conferred mutual benefits to each. The requirement of operating and maintaining the entire building remained with the state. The restaurant guests had the convenience of the state's parking, while the convenience of parking might well provide the restaurant additional guests. Moreover, the Court was cognizant that the restaurant discriminated for the benefit of its business and that the profits from this discrimination were an indispensable element in the success of the state's parking venture. *Id.* at 860.

The factors held to constitute the state as a joint participant in the prohibited conduct in *Burton* are not present here. The Port Commission is Ormet's landlord and little else. The payment of rent is the only significant contact between them. Ormet operates the entire facility. There is no suggestion that any other Port Commission properties or operations are interrelated with Ormet's tug service. Under such circumstances the Port Commission can hardly be characterized as a joint participant in the challenged tug services, and Ormet's private business activities are free of Commerce Clause restraints.

The Louisiana Supreme Court preferred the analysis of *San Francisco Arts* to *Burton*. Under that test, as well, Ormet's tug service passes muster as purely private action. In *San Francisco Arts*, a case much more "commercial" in nature than *Burton*, this Court further explained that state action is not normally found unless the state ". . . has exercised coercive power or has provided such significant encouragement, either overt or covert, that the [action] must in law be deemed to be that of the [government]." *San Francisco Arts*, 483 U.S. at 546. In the present case, the Port Commission's reticence to become involved in this controversy, other than to decide that its lease was not being violated, cannot be fairly described as either compulsion or encouragement of Ormet. Accordingly, Ormet's tug services met the private action test of *San Francisco Arts*, as well as *Burton*. Contrary to

petitioners' assertions, no new rule of "state action" was thus created by the Louisiana Supreme Court. It accurately followed this Court's decisions. To the extent there may be inconsistent case law in this area, as suggested by the petitioners, it would be unfortunate to inoculate this Court's body of Commerce Clause precedents with any such inconsistency.

As may be noted from review of the state action cases cited by petitioners, all involve issues of fundamental individual rights. None involve the Commerce Clause and, so far as respondent can determine, there are no Commerce Clause cases extant that involve state action analysis. This alone would suggest that questions of "state action" are largely irrelevant to the Commerce Clause. The decisive issue is market participant versus market regulator, an issue resolved in the case by the Louisiana Supreme Court following guidance of this Court's precedents.

C. There is no open issue of national importance in this case because Congress has affirmatively acted to impose a regulatory structure on the operations of marine terminals.

Ormet agrees that the ports and terminals of this country are a matter of national importance. Congress has regarded the operations of marine terminals as sufficiently important to affirmatively exercise its Commerce Clause powers and create for them a statutory scheme of regulation, the Shipping Act of 1984, 46 U.S. Appx. § 1701, *et seq.*, and a regulatory agency, the Federal Maritime Commission to enforce the scheme.

Section 1703(b) of the Shipping Act provides that it is applicable to the contracts of marine terminal operators involving ocean transportation in foreign commerce. Section 1709(d) provides that marine terminal operators shall establish reasonable regulations and, by reference to subsections (b)(11) and (12), prohibits terminal operators from giving any unreasonable

preference to anyone or subjecting them to any unreasonable prejudice or disadvantage.

The petitioners herein have carefully refrained from asserting any claim against Ormet or the Port Commission under the Shipping Act; however, the Act has not gone unnoticed. River Parishes Co., Inc., ("RIVCO") the third and smallest of three companies on the river who do not serve Ormet's terminal, asserted a claim with the Federal Maritime Commission ("FMC") under the aforementioned provisions of the Shipping Act, claiming that it was injured by Ormet's exclusive tug services. RIVCO participated in the present case as an intervening plaintiff at the trial level but has focused its efforts on the FMC.

In RIVCO's proceeding with the FMC, a full trial was conducted before Chief Administrative Law Judge Norman Kline to determine the reasonableness of Ormet's exclusive tug services. The trial, conducted during September — November, 1997, allowed the judge to examine not only the facts considered by the state trial judge at the injunction hearing in this proceeding two years earlier, but also the actual effect of Ormet's exclusive tug services on the shipping industry during the following two years. Unlike the state court trial judge, the ALJ was in a position to review historical evidence instead of simply hearing the parties' predictions of the future course of events. (The ALJ's opinion, which is some 112 pages in length has been submitted to the Court as a lodging appendix contemporaneously with this brief.)

In his decision, the ALJ considered, among other things, the relationship of the Port Commission and Ormet, the details of Ormet's exclusive tug services and the reasons for instituting them, the reasonable cost of Ormet's service compared to the other tug companies, and its effect on the shipping business in Baton Rouge. His conclusion was that Ormet's exclusive tug service was justified, economical and neither undue nor unreasonable under the aforementioned provisions of the Shipping Act.

RIVCO has appealed from the ALJ's decision to the full FMC which heard oral argument on October 28, 1998. The FMC has since issued written notice that its opinion will be handed down on February 3, 1999.

The FMC's proceedings are significant to petitioners' writ application in several respects. First, the proceedings belie petitioners' rhetoric that Ormet's tug services are a "cancer" that will spread unfettered through "the national economic body" unless restrained by this Court under the Commerce Clause. To the contrary, Ormet's practices are presently being scrutinized by the regulatory agency that Congress, in the affirmative exercise of its Commerce Clause powers, has entrusted with such oversight.

Secondly, the FMC proceedings have involved considerably more evidence, primarily consisting of over two years of actual operations of Ormet's tug service, than is available to this Court on the record of this case. This Court need not and ought not act in a Commerce Clause matter, the primary responsibility for which Congress has delegated to the FMC and which the agency is actively considering. While respondents have not raised any issue of primary jurisdiction in this case in order to reach the numerous state law claims raised by petitioners in the courts below, it is submitted that as the case now stands the Court should be cognizant of the FMC's ongoing review.

Lastly, the ruling of the ALJ is important because as the first round of review by the expert agency charged with regulation of marine terminals, it represents a considered decision of Ormet's tug service and its impact on the shipping industry in general and, in particular, on the smallest of the competing tug companies. Strong consideration should be given to these findings as they represent an approval of Ormet's tug service by an expert fact-finder.

D. Ormet's tug service arrangements do not discriminate against interstate and foreign commerce nor do they burden it.

Although the petitioners have claimed that Ormet's lease and tug contract discriminate against interstate commerce, this claim is mere argument. No discrimination of any kind in favor of local commerce has been shown. All of the parties are engaged in one way or another in the stream of interstate and foreign commerce. Petitioners' claim that shipowners can no longer hire tugs of their choice does not raise a question of discrimination against interstate commerce, as all shipowners are treated alike and there is no evidence that local shipowners (if there are any) receive a preference. In point of fact, the shipowners receive the benefit of lower tug rates, a reality which probably accounts for the notable absence of any complaining shipowners in this case.

The petitioners' claim that they themselves are impacted also fails to state a claim under the Commerce Clause when they only allege they have been excluded in favor of another tug company and fail to allege how this impermissibly favors local interests to the detriment of interstate commerce.

The important point is that all the parties are engaged in interstate and foreign commerce. It was recognized over a hundred years ago that tugs assisting ships engaged in foreign or interstate commerce are themselves operating in such commerce. *Moran v. City of New Orleans*, 112 U.S. 69, 5 S. Ct. 38, 28 L. Ed. 653 (1884). Similarly, terminals are engaged in interstate and foreign trade. *St. of Cal. v. United States*, 320 U.S. 577, 586, 64 S. Ct. 352, 357, 88 L. Ed. 322, *reh. den.*, 64 S. Ct. 516, 321 U.S. 802, 88 L. Ed. 1089 (1944). Thus, Ormet and Bisso Towboat are equally operating in interstate and foreign commerce equally with Crescent and E. N. Bisso, and no favoritism for "local" interests has been shown.

In point of fact, the appellants' real complaint is that they have been discriminated against when the dock's business is contracted to a competing tug company. However, the Commerce Clause does not protect them from such competition. Rather, "the Commerce Clause protects the interstate market, not individual firms, from prohibitive or burdensome regulations." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-128, 98 S. Ct. 2207, 2214-15, 57 L. Ed. 2d 91 (1978); *Wood Marine Service, Inc.*, 858 F.2d 1061 (5th Cir. 1988). "Interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another." *Exxon*, 437 U.S. at 127. The Commerce Clause does not concern "the particular structure of methods of operation in a retail market." *Id.* Private parties such as Ormet are free to create new and efficient business structures without Commerce Clause restraint and subject only to Congress' regulatory power. Accordingly, neither the appellants' individual right to seek tug business serving Ormet's dock, nor the fact that they are excluded from the tug business at Ormet's terminal in favor of a competing tug company, raises a claim under the Commerce Clause. *Wood Marine Service*, 858 F.2d at 1065-1066.

Similarly, Ormet's tug service is not a burden on commerce. On the contrary it is a benefit. The ships calling at the dock benefit from the increased safety of Ormet's dedicated tugs and Ormet's lower rates. As an example, Charles Andrews, president of petitioner, Crescent, testified that Ormet's tug rates were *not* higher than his own. When questioned by his own lawyer, he stated:

> Q: Now are you aware of the present rates being charged for tugs by Ormet?
>
> A: Yeah, I have seen—I have seen the printed sheet.
>
> Q: Are these rates higher than what Crescent would charge?
>
> A: No.

R. 433. Petitioners also called Channing Hayden, president of the New Orleans Steamship Association, an organization of shipowners and agents, as a witness. He testified that ships were being charged $1,400 to $1,500 by the tug companies to dock at the terminal in comparison with Ormet's charge of $1,450. R. 324. Clearly, Scott Slatten, vice president of Bisso Towboat, was correct when he testified that Ormet's price was "highly competitive." R. 384.[5] This, of course, was as matters stood in 1995. Since then, the tug companies' rates have gone up several times while Ormet's stayed the same, as the ALJ noted in the parallel FMC proceeding.

Lastly, it must be pointed out that the activity complained of is a fee-for-service arrangement. According to the evidence adduced at trial, Ormet requires ships calling at the terminal to use its tugs for docking and then sub-contracts the tugs from one of appellants' competitors. R. 188. This dispute concerns only who is entitled to render the service and receive the tug fees. There is no evidence in this case that shipowners are being charged unreasonable rates for tug service at the terminal. On the contrary, the evidence is that the flat rates charged by Ormet are competitive with or less than the "discounted" rates charged by the other tug companies. R. 324, 377, 384, 433; Exhibits P-5, P-6, and P-7. Reasonable fee-for-service arrangements like this do not implicate the Commerce Clause. The Supreme Court has consistently refused to construe fee-for-service arrangements as impermissible burdens on interstate commerce. *See New Orleans S.S. Ass'n. v. Plaquemine Port District*, 690 F. Supp. 1515, 1521-1524 (E.D. La. 1988), *affirmed*, 874 F.2d 1018, *amended*, 891 F.2d 1153, *cert. denied*, 495 U.S. 932, 110 S. Ct. 2172, 109 L. Ed. 2d 502 (1990), and cases cited therein.

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5. It is unclear how the Louisiana Court of Appeal concluded that Ormet's charges were "undoubtedly higher". The court apparently overlooked the effect of the tonnage charge and the testimony of Andrews and Hayden. The Louisiana Supreme Court, however, took note that Ormet's charges were competitive.

CONCLUSION

For the reasons set forth above the petition for writ of certiorari should be denied.

Respectfully submitted,

ERNEST L. EDWARDS, JR.
RICHARD B. FOSTER
Counsel of Record
LEMLE & KELLEHER, L.L.P.
Attorneys for Respondent
Ormet Corporation, now known as
Ormet Primary Aluminum Corporation
601 Poydras Street, Suite 2100
New Orleans, Louisiana 70130-6097
(504) 586-1241

APPENDIX A — OPINION OF CHIEF ADMINISTRATIVE LAW JUDGE NORMAN D. KLINE DATED APRIL 30, 1998 IN THE MATTER OF *RIVER PARISHES COMPANY, INC. v. ORMET PRIMARY ALUMINUM CORPORATION, F.M.C. DOCKET NO. 96-06*

(Omitted here but submitted separately as Lodging Appendix)